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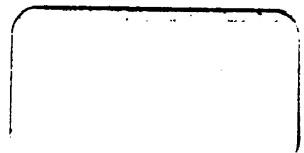
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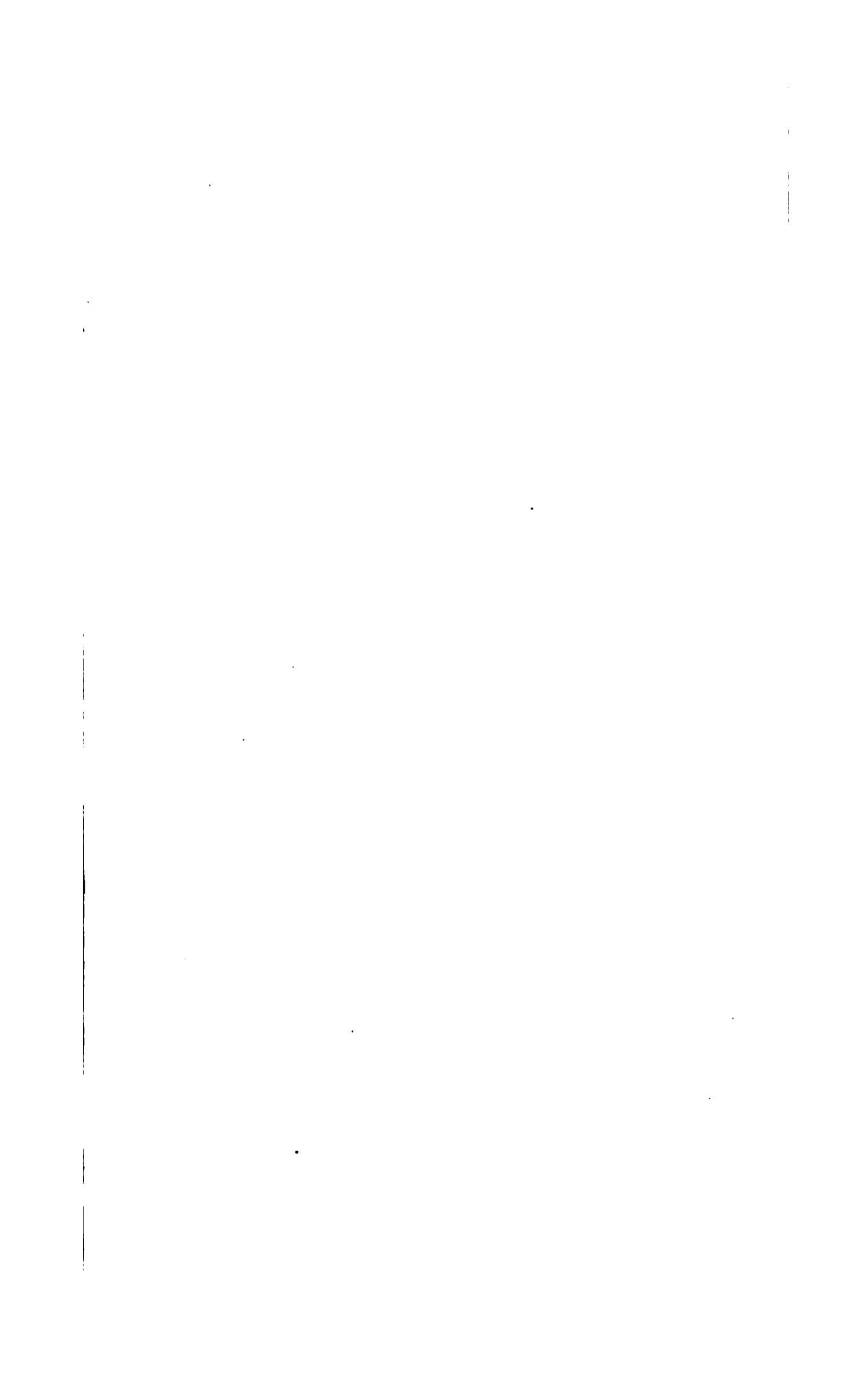
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
AND IN THE
COURT FOR THE CORRECTION OF ERRORS
OF THE
STATE OF NEW-YORK.

BY JOHN L. WENDELL,
COUNSELLOR AT LAW.

VOL. XXIV.

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MEMBERS OF THE COURT
FOR THE
CORRECTION OF ERRORS,
IN THE YEAR 1840.

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SAMUEL NELSON, *Chief Justice,*,
GREENE C. BRONSON, }
ESEK COWEN, } *Justices of the Supreme Court.*

Senators.

FIRST DISTRICT.

| | | |
|--|--|---|
| GABRIEL FURMAN, FREDERICK A. TALLMADGE, | | MINTHORNE TOMPKINS, GULIAN C. VERPLANCK. |
|--|--|---|

SECOND DISTRICT.

| | | |
|---------------------------------|--|--|
| JOHN HUNTER, DANIEL JOHNSON, | | HENRY A. LIVINGSTON, HENRY H. VAN DYCK. |
|---------------------------------|--|--|

THIRD DISTRICT.

| | | |
|--------------------------------------|--|------------------------------------|
| FRIEND HUMPHREY, ALONZO C. PAIGE, | | ERASTUS ROOT, MITCHELL SANFORD. |
|--------------------------------------|--|------------------------------------|

FOURTH DISTRICT.

| | | |
|----------------------------------|--|--------------------------------|
| JAMES G. HOPKINS, MARTIN LEE, | | BETHUEL PECK, SAMUEL YOUNG. |
|----------------------------------|--|--------------------------------|

FIFTH DISTRICT.

| | | |
|------------------------------|--|--------------------------------|
| JOSEPH CLARK, SUMNER ELY, | | AVERY SKINNER, DAVID WAGER. |
|------------------------------|--|--------------------------------|

SIXTH DISTRICT.

| | | |
|--|--|------------------------------|
| DANIEL S. DICKINSON, ANDREW B. DICKINSON, | | LAURENS HULL, ALVAH HUNT. |
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SEVENTH DISTRICT.

| | | |
|-------------------------------------|--|--|
| SAMUEL L. EDWARDS, JOHN MAYNARD, | | ROBERT C. NICHOLAS, MARK H. SIBLEY. |
|-------------------------------------|--|--|

EIGHTH DISTRICT.

| | | |
|--------------------------------|--|--------------------------------------|
| ABRAM DIXON, HENRY HAWKINS, | | WILLIAM A. MOSELEY, SAMUEL WORKS. |
|--------------------------------|--|--------------------------------------|

J U D G E S
OF THE
SUPREME COURT OF JUDICATURE,
OF THE
STATE OF NEW-YORK,

DURING THE TIME OF THE TWENTY-FOURTH VOLUME OF THESE REPORTS.

SAMUEL NELSON, *Chief Justice.*
GREENE C. BRONSON, } *Justices.*
ESEK COWEN, }

Circuit Judges.

FIRST CIRCUIT,
OGDEN EDWARDS.

FIFTH CIRCUIT,
PHILO GRIDLEY.

SECOND CIRCUIT,
CHARLES H. RUGGLES.

SIXTH CIRCUIT,
ROBERT MONELL.

THIRD CIRCUIT,
JOHN P. CUSHMAN.

SEVENTH CIRCUIT,
DANIEL MOSELEY.

FOURTH CIRCUIT,
JOHN WILLARD.

EIGHTH CIRCUIT,
NATHAN DAYTON.

WILLIS HALL, *Attorney General.*

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A R G U E D A N D D E T E R M I N E D
I N T H E
S U P R E M E C O U R T O F J U D I C A T U R E
O F T H E
S T A T E O F N E W - Y O R K .

I n May Term, 1840—in the sixty-fourth year of the Independence of the United States.

[Continued from Vol. XXIII.]

DIAS vs. BRUNELL'S executor.

An action of *law* will not lie by a *cestui que trust*, against the executor of a trustee, created by an assignment for the benefit of creditors, upon an *implied promise* arising from the acceptance of the trust, and the conversion of the fund into money; the party must resort to equity.

It seems, had there been an *express promise* by the testator, and there had been *assets*, that an action would have lain against the executor.

Property held in *trust*, on the death of the trustee, at common law passed to his executor; but not as *assets*. He took not as *executor* but as a *trustee*, subject to the same stipulations and conditions under which it was held by the testator. Now, by the revised statutes, *it seems* the trust vests in the court, of chancery with all the powers and duties of the original trustee, and may be executed by some person appointed for that purpose under the direction of the court. 1 R. S. 2d. ed. p. 724, § 68.

DEMURRER to declaration. The plaintiff declared in *assumpsit*, setting forth that on the 14th day of May, 1833, two individuals, named *Castro* and *Lienriquez*, executed to the testator, his *heirs, executors, administrators, and assigns*, a conveyance of divers goods, &c. of the value of \$100,000, *in trust* to convert the same into money and apply the proceeds: 1. To "the payment of the expenses of the trust; 2. To repay himself certain advances, and 3. To pay certain bonds to the United States, ex-

New-York, May, 1840.—*Dias v. Brunell's ex'r.*

ecuted, some by *Castro* jointly with Brunell and others by *Castro* jointly with Brunell and some other person; or if the bonds should be paid by Branell or by any other person, then to *repay* to Brunell or such other person, the amount of the bonds. The plaintiff then averred that Brunell accepted the trust and promised to perform the same; that he took into possession the assigned property and converted it into money to the amount of \$100,000, which was sufficient to satisfy all the trusts; that two of the bonds referred to in the conveyance in trust were executed by *Castro* jointly with Brunell and the plaintiff, upon one of which bonds was due the sum of \$2968, and on the other the sum of \$2969; that after the death of Brunell, to wit, on, &c at, &c. the plaintiff paid to the United States \$1000, on account of two judgments recovered against him upon the bonds before specified. *By means whereof, and of the acceptance of the trust and of the receipt of the property and moneys* by Brunell, in his life time, the defendant as executor became liable to pay to the plaintiff the money so paid by him; and being so liable, promised to pay, &c. Nevertheless, &c. There was a second count substantially like the first, except that it alleged in addition that the defendant, as executor, had also received divers other large sums of money, amounting to \$50,000, the proceeds of the assigned property. The defendant put in separate demurrers to the two counts.

L. H. Sandford, for the defendant, insisted: 1. That there was no privity of contract between the testator in his life time and the plaintiff in respect to the assignment; the plaintiff had no legal interest in the contract, and could not have maintained an action at law against the testator. 1 *R. S.* 723, § 60, 2nd ed. *Hammond on Parties*, 4, 6, 7. 7 *T. R.* 664. *Co. Litt.* 272, b. § 464. *Cruise*, tit. 11, ch. 2, § 2. *Comyn's Dig.* tit. *Accompt D.* 3 *Bos. & Pull.* 162. 2. The conveyance being in trust, an action at law would not lie against the trustee, 18 *Wendell*, 236. *Lewellen on Trusts*, 20, 103, 573. *Law Library*, vol. 24. 4 *Kent's Comm.* [*11] *288.

3. The trust being express, was not assignable, and did not pass to the defendant, as executor, under the last will and testament of the trustee. 1 *R. S.* 724, § 68, 65. 1 *Cruise's Dig.* 488, tit. 12 ch. 1, § 69; ch. 4, § 53 to 58. 1 *Vesey*, 468. *Ambl.* 552. 4. The assigned property and effects were not assets in the hands of the executor. *Story's Equity*, 241. 5. The promises of the defendant are not laid as *express promises*, but as promises *arising by implication of law* from the facts stated.

J. Greenwood, for the plaintiff, insisted that under the circumstances detailed in the declaration, the trustee was liable at law, and that such liability passed to his executor. The trust fund passed by the express terms of the

New-York, May, 1840.—*Dias v. Brunell's ex'r.*

conveyance to the *trustee*, his *executors*, &c. The second count alleges that the defendant, *as executor*, received \$50,000, the proceeds of the property, and that he promised to pay. The property received was a good consideration for the promise, and on proof at the trial of an *express promise*, the plaintiff will be entitled to recover. His character as *executor*, as described in the declaration, may be rejected as surplusage. The counsel cited in support of these several propositions, *Weston v. Barker*, 12 Johns. R. 276; 3 id. 72; 1 Johns. Cas. 205; 1 Caines, 363; 10 Mod 254; *Cowper*, 289; *Toller's Law of Ex'r's*. 429, 460.

By the Court, NELSON, Ch. J. This action was probably brought upon the strength of the case of *Weston v. Barker*, 12 Johns. R. 276, but it is distinguishable from it in two very important particulars.

1. The judgment there was manifestly placed upon the ground, that the facts disclosed amounted to an *express promise* on the part of the trustee to pay the plaintiff's demand. He had agreed in terms to hold the balance in his hands *subject to the order of the assignors*, and which was made in favour of the plaintiff, and notice communicated before the money was received. After this, the court regarded the money, when received, as the money of the plaintiff, and held for his use.

No case can be found, I think, where an action at law has been sustained against a trustee for the benefit of creditors, upon an [*12] implied promise arising merely out of the acceptance of the trust to pay the demands of the particular creditors. Their interests are equitable, and belong to another forum.

There are cases of a simple trust, where courts have frequently seized upon slight circumstances, for the purpose of creating a privity of contract between the trustee and a third person, and thereby save the expense and delay of a resort to a court of equity. Several of these are referred to by Chief Justice Thompson in *Weston v. Barker*. In *Winch v. Keely*, 1 T. R. 619, Ashurst, J. said, that courts of law did not formerly take notice of a trust, for trusts are within the original jurisdiction of a court of equity; but of late years, he observes, "it has been found productive of great expense to send the parties, there, and wherever this court has seen the justice of the case clearly with the plaintiff, it has not turned him round on this objection."

In *Williams v. Everitt*, 14 East, 582, one K. sent bills to the defendant, his banker, with directions to pay part of the proceeds of them to the plaintiff, and though he received the bills and the money upon them, it was held an action could not be maintained for money had and received, because as between the plaintiff and him there was no privity, either express or implied. This case comes nearly up in principle to the one before us, though the trust was a very simple one.

New-York, May, 1840.—*Dias v. Brunell's ex't.*

II. But the case under consideration differs also from *Weston v. Barker*, inasmuch as it presents a complication of trusts wholly beyond the jurisdiction of a court of law to execute. Even if we could get over the objection that the plaintiff, in whose favour the trust is created, among others, is not a party to the deed, and that therefore there is a want of privity, it would still be impossible to sustain the action without involving in the course of the proceedings a settlement of the whole trust estate; and if the fund should fall short, of making an equitable apportionment as the case might be. It is true, the declaration avers a sufficiency of funds, and which must be taken as admitted here; but we cannot fail to see, if the demurrer should [*18] be overruled, and "the cause go to issue, the consequences I have stated must necessarily follow.

It cannot be necessary for courts of law, at this day, to repudiate any such jurisdiction; they never possessed it, and are sufficiently burthened with their own legitimate duties, if no other considerations influenced them, not to desire a most inconvenient enlargement by usurping the peculiar province of another forum. 5 *Vesey*, 581. *Willis on Trusts*, 7, 8, and note k. and 16. *Lewellen on Trust*, 20. 2 *Hall's R.* 130.

If an *express promise* had been made by the trustee in the *cestui que trust*, then no examination into the condition and state of the trust would have been necessary; the trustee would have assumed the responsibility of assets, and made himself personally liable.

III. The defendant took the trust estate under the will of Brunell, not as *executor*, but as a *trustee*, subject to the same stipulations and conditions under which it was held by the testator. The fund is not assets. *Willis on Trusts*, 58, n. 111. *Math. on Ex.* 100, 119, 245. 10 *Johns. R.* 63. 1 *Johns. Ch. R.* 119. The defendant therefore stands in the position of Brunell, (the testator,) provided he had been alive and the suit brought against him. The fund is not assets, to be applied to the benefit of the general creditors of his estate, but to those for whose use it has been assigned. 1 *Johns. Ch. R.* 119.

I admit, if it had appeared that the testator had made himself personally liable at law to the plaintiff by means of an *express promise*, the executor might be charged, provided sufficient assets came to his hands; the plaintiff would then stand on the footing of a general creditor of the estate. An *implied promise* arising out of the acceptance of the trust, and undertaking to perform it, we have already seen, is not sufficient to charge the trustee individually at law, and of course devolves no obligation upon his personal representative.

In any point of view I have been able to take of the case, I am unable to perceive the ground upon which the action can be sustained.

Judgment for defendant.

OF THE STATE OF NEW-YORK.

New-York, May, 1840.—*Hart v. Coltrain.*

*HART and others vs. COLTRAIN.

On a motion for a new trial on a case made, the court will receive *documentary evidence*, which could not have been controverted had it been produced at the trial, to defeat the motion; but this rule does not apply where the motion for a new trial is founded on a *bill of exceptions*.

IN October, 1835, the plaintiffs in this cause obtained a verdict, which was set aside, and a new trial granted in May term, 1838. *See* 19 *Wendell*, 378. The cause was again tried, and a verdict found for the defendant. The plaintiffs, on a *bill of exceptions*, now move for a new trial. The action was *ejectment*, and the plaintiffs claimed to recover as the *heirs at law* of *Jacob Hart*. The defendant claimed under a sale by virtue of an order of the judge of the *court of probates* of this state, made in 1814, on the petition of the *administrator* of the estate of *Jacob Hart*. The plaintiffs objected, among other things, that the judge of the court of probates had not jurisdiction in the matter, because it did not appear that the administrator had made and presented to the judge *an account of the personal estate of the intestate*. The jury, under the charge of the judge, notwithstanding, found a verdict for the defendant; and now on the argument of the cause, the counsel for the defendant presents an *exemplification* of an affidavit made by the administrator on the 4th August, 1814, before the judge of the court of probates, which he insists, with the matters proved on the trial, is sufficient to show that the judge had jurisdiction.

B. Davis Noxon, for the plaintiffs.

M. T. Reynolds, for the defendant.

By the Court, BRONSON, J. On a second trial of this action, *see* 19 *Wendell*, 378, the defendant obtained a verdict, and the plaintiffs took *exceptions*. The plaintiffs, among other things, objected that the judge of the court of probates "had no jurisdiction to order a sale [*15] of the real estate, because it did not appear that the administrator made and presented to the judge *an account of the personal estate and debts of the intestate*. 15 *Wend.* 450. 19 *id.* 334. 20 *id.* 241. By way of answer to this objection, the defendant has, since the trial, produced an exemplified copy of an affidavit made by the administrator before the judge of the court of probates, on the day the sale was ordered; and he insists, that this affidavit, in connection with the matters proved on the trial, shows that such an account was presented as would give the judge jurisdiction to order a sale.

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A motion for a new trial, on a *case* made, is addressed to the sound discretion of the court; and where the party relies on some defect in the proofs, which is afterwards supplied by evidence which could not have been controverted had it been produced at the proper time, and the court see that a new trial could be of no use, the motion will be denied. *Burt v. Place, 4 Wendell, 597, and cases cited.* But this rule does not apply to a *bill of exceptions*, and we cannot look into the affidavit.

New trial granted.

MC PHERSON vs. CHEADELL.

A physician may maintain an action for services rendered by him in his profession. Whether he can maintain such action without producing a *diploma*, or a *license* granted by a medical society, after a compliance with the first act of the legislature upon the subject, *quere*.

The effect of the several acts of the legislature regulating the practice of *physic and surgery* upon the rights of physicians, considered and commented upon.

The supreme court, on writ of error removing a record from the common pleas, will not look into a *special report* made by references to the common pleas containing only the *evidence of the facts* transpiring upon the hearing, and the decisions made in the admission and rejection of testimony, and upon questions of law arising in the course of the hearing.

On the refusal of a *court of common pleas* to set aside a *report of referees* for alleged errors in the hearing of the cause, if the loosing party desires to review in the supreme court the decision of the common pleas, he must procure a *statement of facts*, not the *evidence of the facts*, to be drawn up under the direction of the common pleas and placed upon the record [^{*16}] in the form of a *special report* in the nature of a *special verdict* or *bill of exceptions*.

ERROR from the Montgomery common pleas. Cheadell sued McPherson in 1837, in an action of *assumpsit*, for services rendered as a *physician*, and for medicines furnished from 1808 until 1836. The defendant pleaded the *general issue* and the *statute of limitations*. The cause was heard by reference, and in the record brought up to this court there was incorporated a *special report* of the referees made to the court below, in which the referees certify that "The following is a statement of the proofs and objections, &c." They then proceed and state the names of the witnesses called by the plaintiff below, with the particular matters to which they testified, as nearly, probably, as might be in the language of the witnesses.

To show the plaintiff's right to practice as a physician, his counsel produced the following instruments: "State of New-York, Montgomery County Medical Society, [L. S.] This may certify that Elijah Cheadell is a le-

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gal attending member of said society. In testimony whereof, we have hereunto affixed the seal of the same, this 16th day of October, A. D. 1806. By order of said society. Alexander Sheldon, president. Stephen Reynolds, secretary.” “State of New-York, Montgomery County Medical Society, [L. S.] This may certify that Elijah Cheadell, of Johnstown, is a legal attending member of society. In testimony whereof we here affix the seal of the same, this 11th day of October, A. D. 1820. By order of the society. Samuel Maxwell, president. Oran Johnston, secretary.” The admission of these instruments being objected to as insufficient, because they were neither licenses nor diplomas, and on various other grounds, the referees received them, saying they should not hold them sufficient, unless the *diploma* of the plaintiff should be produced. Accordingly, in the progress of the plaintiff’s evidence, his counsel produced an exemplification, made by the Montgomery county clerk, of a paper which he claimed to be a license in the words and “figures following: “This may certify that [*17] sufficient evidence hath been produced to me that Elijah Cheadell, of Johnstown, county of Montgomery, state of New-York, hath been regularly educated in and practiced physic and surgery and midwifery, for more than two years last past; and do hereby allow the same to be recorded. Given under my hand and seal, this 19th day of September, 1797. Simon Veeder. [L. S.] Filed 20th September, 1797.” The exemplification was under the seal of the Montgomery county court, and attested in the usual form, in the name of the first judge. The defendant’s counsel objected that this was not competent evidence, nor was it a license or diploma, authorizing the plaintiff to practice under the statute of this state. But the referees received it. It was also proved by *parol*, though this was objected to, that the plaintiff has been for 25 years an attending member of the Montgomery county Medical Society. It farther appeared that the plaintiff had been in general practice as a physician during the whole time embraced by his account current; and for forty years before the hearing. This testimony was received after objection taken, that the plaintiff could not show himself a physician except by a diploma or license.

The references farther certified that the plaintiff produced his account books, and they set forth in full the evidence given to verify them, with an exact copy of the charges. It was objected that the plaintiff’s accounts were barred by the statute of limitations. But to this the referees answered they would hear the evidence on both sides, and reserve their opinion until their final decision.

The defendant’s testimony was also detailed in the report. Much of it was intended to impeach the general accuracy or honesty of the plaintiff’s account books. This was in turn sought to be repelled by witnesses who

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were sworn for the plaintiff. All the evidence intended for these various purposes was minutely set forth as it was given on both sides. The defendant disavowed any claim of credit or set off.

The referees reported that they found the plaintiff's accounts, [*18] as proved, to amount in the whole to \$125 ; that "they found his books to be fair ; that they allowed the credits in his books, which they stated were interspersed among his charges, and amounted to \$48,73 ; and concluded, that if the court should be of opinion under the circumstances that the statute of limitations did not attach, they found for the plaintiff \$76,27, being the balance after deducting the credit ; but that if the court should be of opinion that the statute did attach, they found for the plaintiff \$37,94, being the amount proved to have accrued within six years before suit brought. Again : if the court should be of opinion that the objection was well taken that the proof did not show the plaintiff was licensed, and it was necessary for him to prove himself licensed, then they found for the defendant ; and again : in case the court should be of opinion that the plaintiff was entitled to recover the whole of his account, without the deduction of any part of the credit by him given, then the referees reported in favor of the plaintiff \$125 : all of which, they added, was submitted subject to the opinion of the court on the several questions thus raised.

The common pleas rendered judgment for the plaintiff for \$76,27, with costs. The defendant sued out a writ of error.

M. T. Reynolds, for the plaintiff in error, insisted that there was no legal evidence that the plaintiff below was a *physician*, and that the plea of the *statute of limitations*, at all events, limited the right to recover to \$37,94.

D. Cady, for the defendant in error, contended that this court could not notice any of the evidence spread out upon the record ; that it should have been put in the form of a special verdict or bill of exceptions to enable them to do so ; and that in all other respects the judgement below was correct.

By the Court, COWEN, J. A preliminary point taken by the counsel for the defendant in error is, that we have no right to notice any of the testimony entered on the record. By the 2 R. S. 306, 2d ed. § 48, the court ordering the reference may require the referees to report their decision [*19] in admitting or rejecting any witness, in allowing or disallowing "a question to or answer by a witness, and all other proceedings by the referees, with the testimony before them, and their reasons for allowing or disallowing any claim of either party. The report in question was, in these respects, sufficient for the purposes of the court below ; and it warranted the judgment which they rendered, unless the report be exceptionable in some other respects.

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But, on error, it is not so drawn as to present any of the questions which were raised before the referees. In regard to these, where the question is intended to be made on facts properly in evidence, the court below must cause a report as of the referees, to be drawn up and entered upon the record stating the facts (not the evidence of the facts) found by them, and the questions of law arising upon such facts must appear to have been passed upon by the court. The questions so passed upon then come before us substantially in the same way, and are dealt with upon the same principles, as if the judgment below had been founded on a special verdict. The report is said to be in nature of a special verdict. *Feefer v. Heath*, 11 *Wendell*, 477, 481; *Melvin v. Leaycraft*, 17 *id.* 169. If the question come here upon a point of law, in admitting or denying evidence at the hearing, it must also appear to have been presented to the referees, and finally passed upon by the court, with the same pointed exactness as we require in a bill of exceptions. This must also appear by a report, speaking in the name of the referees, to be framed by the court below and entered upon the record; and it is then said, by the cases before cited, to be in the nature of a bill of exceptions. We will not say that an exception must be taken and entered on the record in terms, as is required where the objection is raised at a jury trial. The statute allowing exceptions is not strictly predicable of a hearing before referees. But in both cases, whether the question came up on facts found, or on rejecting or admitting evidence, it must appear that the court below (not merely the referees, but the court itself,) has passed upon the question sought to be raised here. The only substantial difference is, that the report of referees may combine the double character of a special verdict and bill of exceptions. *The People v. The Superior [*20] Court of the City of N. Y.*, 20 *Wendell*, 663.

In this case, it may be said that the court below must necessarily have held that the testimony showing that the plaintiff below had a license was sufficient. The answer is, that the facts going to make out the license are not stated as facts found, but only the evidence of them is given; for instance, the exemplification is stated to have been produced, and certain oral and other proof received tending, as supposed, to make out a license. Again, the court may have determined that it was not necessary to prove a license. If it be said that certain parts of the evidence tending to show a license were objected to, but received by the referees, it is impossible to say what part was viewed as competent by the court, or whether they held that no proof was necessary beyond the fact that the plaintiff was retained and acted as the defendant's physician. The referees left it for the court to decide whether a license was proved, if such proof were necessary. This left the question to the court below, thus: Was the evidence sufficient to show a license? If not, was there evidence enough to conclude the defendant, with-

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out the formal proof of a license? Again: was the evidence sufficient, in either view, to sustain the whole or any part of the plaintiff's claim? The fatal objection is, that these may have been all questions on the weight of the evidence. Neither the referees nor the court tell us whether they allowed and acted on the written or oral evidence. The former received some of both after objection made, but the court do not tell us whether they considered it properly received or not. They had the power to say that though improperly heard, it could do no harm, for there was enough of lawful proof without it. So far, it is impossible to see that the court decided a single question of law.

Then, as to another point taken by the defendant, viz. that the credits entered by the plaintiff within the six years would not take the case out of the statute of limitations, the court decided nothing in terms. The referees submitted to them whether the statute attached or not, under the circumstances. [*21] The court decided simply that the plaintiff should recover a certain sum. We may infer that they allowed the credit against the plaintiff, and held that these took the case out of the statute; but they might have proceeded on other grounds. Neither the dates nor other particulars as to the credits are set forth. Beside, I do not see that the point was made before the referees that these credits could not be allowed as taking the case out of the statute. Had it been raised, perhaps the objection might have called out farther proof.

It is enough, however, to say that a writ of error does not go to the referees, any more than to a jury; it lies for error of the court below only, apparent on the record itself. To allow a writ of error at all from a decision on a report of referees, is an anomaly. It is nowhere expressly given by statute, nor is the method of making the report a part of the record prescribed by the statute. A special verdict was always a part of the record. A bill of exceptions was made so virtually by statute. It is only in analogy to a special verdict, or, if you please, under the equity of the rule which allows a special verdict, and the equity of the statute allowing a bill, that a report can be made any part of the record. If it do not, therefore, present neat points of law, appearing to have been expressly or necessarily decided by the court, the whole is impertinent, and must be disregarded. It is not on the record for the purposes of error, as was held in *Denning v. Smith*, 2 *Wendell*, 303, 306. If there be no point of law decided upon the report, the court below ought to disallow any entry on the record beyond what belongs to it by the common law. If there be a point of law, they must, in the name of the referees, find and enter facts, or rather conclusions of fact alone, raising the question of law, saying they have decided it expressly, or putting it in such a posture and relation upon the record, that the question plainly appears to be involved in the judgment rendered. The substance of all I have

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said on this subject, will be found to have been said heretofore by the chancellor in *Feefer v. Heath*, before cited, which was a case in the court of errors. The rule cannot be departed from in the least without entirely disregarding the nature and office of a writ of error.

*But if the evidence be all considered as stricken out, there is [*22] a defect in the record itself, which leaves it quite doubtful whether the judgment can be sustained. I allude to the form of the general report. This is an essential part of the record. The referees are required by 2 R. S. 305. 2d ed. § 43, to hear and *determine* the matter in controversy. By *id.* 306, § 48, they may be compelled to report the *amount they find due to either party*; and by *id.* § 49, if the report be confirmed, judgment shall be entered thereon in the same manner and with like effect as upon the *verdict* of a jury. The general report must, therefore, by statute, and indeed in the nature of things, be entered like a general verdict; and thus it becomes examinable on error. Now in the case at bar, the referees did not report *any amount* as definitely due to the plaintiff. They merely stated the evidence to the court below, subject to their opinion, in four different aspects. They say, if the court are of a certain opinion on the facts, then they find one sum; if of another opinion, then a different sum; if of a third opinion, still another sum; and, if of a fourth opinion, they find for the defendant. And the court gave judgment for the plaintiff, after finding that one out of the four hypotheses proposed, was true. The report determines nothing except upon a contingency; whereas the statute requires the referees generally to *determine and report the amount due to either party*. It mentions no condition; nor is there anything in the nature of the proceeding or the analogy of awards or verdicts, which would warrant the referees in thus throwing off the responsibility committed to them by the law. They might as well report the facts, and say they could not find one way or the other, and leave the whole open. Indeed they have here come little short of that. A jury may find a special verdict, and refer the law to the court; but they cannot make as many alternatives as they please. They find the facts; and say, if on these the court is for the plaintiff (in the language of the issue) then we find for him; if otherwise, then for the defendant. But in no case can they state merely the evidence which *came before them, and demand [*23] that the court should find the facts which go to make up the question of law. The report is in nature of a verdict subject to the opinion of the court below on a case. But such can never be noticed as part of the record on a writ of error. An issue having been joined, it could be determined only by a verdict or report of referees. There being no verdict, and the report being defective in substance, probably no judgment could be rendered on an entry upon the record in the form before us. But I advert to the defect, merely because we do not wish to be considered as sanctioning

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this mode of reporting. The objection to the form was not made on the argument, though the attention of counsel was called to it. Probably the form was adopted by consent. At any rate, no point was made upon it before us; and it might by violating the understanding of the parties, were we to reverse the judgment, and send down the cause for review on a ground not even hinted in any way; inneed expressly waived by the only party who could object. The forms of business in the court where the cause is pending, are many times mere creatures of practice; and consent will even take away error, if the objection do not reside in a want of jurisdiction. A party may always waive a law which is for his own benefit. The whole matter seems to have been conducted in analogy to a proceeding once very common in this court: a verdict subject to the evidence presented by a case on which this court pronounced as a jury. But the verdict was then always received and entered on the record as a general one. The condition on which it was received never appeared there; nor was the special case alluded to in any way. An entry of the condition would undoubtedly have been cause for reversal on error. We cannot object to any other court adopting the like practice, either in respect to verdicts or reports; though it was found so inconvenient here that we narrowed it by a general rule requiring the case to be as certain as a special verdict. But when a record comes here on error, it must present a definite verdict or report. The court of original jurisdiction, on a case subject to their opinion, exercise the [*24] "right of entering the verdict or report in that way, as the language of the jury or referees, although in fact it be only their own conclusion. So a case is sometimes made by consent, subject to be turned into a special verdict or bill of exceptions; and it is accordingly moulded and entered of record as the language of the jury or as embodying the decisions of the circuit judge. The record before us, were we to hold it defective, might, and we may infer from the course taken, would be amended and put into regular form by the court below.

So much for the mode in which the matter before us is presented. It is entirely clear that we cannot notice the point raised as to the *statute of limitations*. It is impossible to conjecture with any safety, or even probability, that it was raised. The only hint as to the credits given by the plaintiff, is in that part of the case where the defendant abandoned all claim to credit or set off, without saying one word of the purpose he had in view. His very object, perhaps, was, to obscure the bearing it might have at the hearing, and present it for the first time on error brought.

I think it also quite certain, on the principles stated, though the conclusion is not so direct, that the points decided by the referees on admitting or denying evidence adduced to prove the qualifications of the plaintiff below, are not sufficiently stated. But suppose I am mistaken, and it is our duty to examine their decisions, let us see to what they amount.

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In the first place, I doubt much, whether the defendant below after retaining the plaintiff as a physician, and accepting his services as such, could call upon him in the first instance, to prove a regular license. In other like cases the presumption is against the defendant. It is so as between attorney and client, in a suit for services performed under a retainer. *Pearce v. Whale*, 7 Dowl. & Ryl. 512, 515, *per Bayley, J.* 5 Barn. & Cress. 38, S. C. There, if the objection sound in the fact that the plaintiff was never admitted, or that his admission has become inoperative, it lies with the defendant to show it. *Id.*; and see *Berryman v. Wise*, 4 T. R. 566; and other cases, 1 Phil. Ev. 227, *Cowen & Hill's ed. [*25] Beside, the contrary would be doing great violence to the presumption that no man will transgress the command of a positive law. The plaintiff had practised some forty years at least; for much of this period, there was a penalty collectable of any one who practised without a license; and such an act was, for the period, contrary to the statute. He could not collect the wages of his practice. Where the question does not arise directly on indictment or action for violating a statute which requires a license, but comes in collaterally as here, the books are very strong that you cannot question the fact of there being a license until you show by negative proof that there was none. *Pearce v. Whale*, already cited, went on that principle. So did quite a number of cases cited in 1 Phill. ut sup. and in the note to that ed. p. 298. In *Smith v. Taylor*, 4 Bos. & Pull. 196, two of the judges held that a slanderer calling the plaintiff, Dr. Smith, and imputing not a want of degree but of qualification as a physician, could not call upon him in an action for the slander to prove his degree, especially as the defendant had, as an apothecary, followed the directions of the plaintiff. The time during which the plaintiff had practised was also considered material. *Vide. also Combe v. Pitt*, 3 Burr. 1586; and *Regg v. Cargenven*, 2 Wils. 395.

But if the plaintiff be put to the strictest proof, how will he then stand? He produced a regular license under the act of March 23d, 1797. 3 Greenl. 417, § 1. That act required him to produce satisfactory evidence to some judge of the common pleas of this state, or other officer mentioned, that he had practised physic, or surgery, or both, for the term of two years previous to October 1, 1797, or satisfactory evidence that he had studied, &c. It also required him to obtain a certificate of such satisfactory evidence, from the officer, under his hand and seal, file it with the clerk of the county where he resided, and take a certified copy subscribed by the clerk; otherwise he incurred a penalty of \$25 for every act of professional practice. The license produced was perhaps not strictly formal; but no defect was specifically pointed out. It is said, however, "non constat that Sir [*26] mon Veeder was a judge when he made the certificate of Septem-

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ber, 1797. Of this objection we now hear for the first time. Had it been raised before the referees, doubtless the fact of his being a judge would have been shown, as it might have been, by evidence *aliunde*; *Vide per Denman, C. J. in Collins v. Carnegie*, 1 *Adolph. & Ellis*, 695; or, if raised in the court below, the original certificate was among their records; and the official authority of Veeder might have been proved, or so well known as not to be questioned. This shows how important it is, that we should have the points before us which were raised and decided by the court, with the ground of the decision. The mode of proof was not questioned; and taking Mr. Veeder, as we must, for a judge of the Montgomery common pleas, the certificate was well enough in point of substance. This was preceded by an unofficial certificate that the plaintiff was a member of the county society formed in 1806, under the statute of that year, ch. 138, § 1, revised and re-enacted, 2 *R. L. of 1813*, p. 219. See the note there. In 1818, *Session Laws of that year*, ch. 206, the act of 1813 was amended, and, among other things, every practitioner of medicine was required to attach himself to the medical society of his country, by lodging his certificate with the president. § 7. What consequences should follow the omission is not declared. The unofficial certificate of 1820 was produced in order to show that the plaintiff had complied, as I suppose, with the then last statute. The referees appear very properly to have disregarded both of these last mentioned certificates. But all were referred to the court, together with the presumption that he was a physician in regular standing, and properly connected, arising from the parol evidence. By this he appeared to have been, *de facto*, a member of his county society for a number of years. The regular evidence of membership under the act of 1806, in the absence of any statutory provision, would, perhaps, have been the entry of his name as a member in the books of the corporation, the genuineness of the entry being first established. This [*27] would certainly be evidence as between the corporators; and "not being adduced to show a corporate right against a stranger, but only *res gestae* in forming the corporation, it would probably come within the case of *Highland Turnpike Co. v. M'Keon*, 10 *Johns. R.* 154. The certificate verifying the original formation of the society, required by the statutes to be filed with the county clerk, might also have been evidence, as that should, and doubtless did, contain the names of those who convened. But the plaintiff's name being there, would depend on the question whether he was present at the organic meeting, or was afterwards admitted. Under the act of 1818, the certificate required to be filed by the member himself with the president, would have been perhaps the only evidence. The certificates produced to the referees were not evidence at all, unless there be some statute giving them a greater effect than they have by the common law. We were referred to none such, nor are we aware of any. I speak of the certificates of

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1806 and 1820. I do not perceive why it was not competent to prove, as was done, membership under the acts of 1806 and 1813, by showing that the plaintiff had long been in fact a member of the corporation, participating in its transactions. Neither of these statutes, that we are aware, requires any recorded act of membership as essential to admission. That was reserved for the amendatory act of 1818. Previous to that a few coming together and acting, and filing a certificate of proceedings : in short, going on within the line prescribed by the statutes, constituted a corporation ; the number of which was subsequently enlarged by the accession of members, without any particular form of admission. That the plaintiff below was so qualified to be an original member was shown by the official certificate of Judge Veeder. There was, in that alone, evidence that he had been a regularly licensed practitioner till the act of 1818 ; and it can scarcely be contended that he was disqualified by an omission then to lodge his name with the president. Beside, it is clear that such a mere ceremony should be presumed to have been complied with. An English statute requires an attorney to renew or rather continue his license by taking a certificate of re-admission *annually. It being shown that he had continued to practice, [*28] re-admission was presumed. This was in an action against his client for his fees. *Pearce v. Whale*, 7 Dowl. & Ryl. 512. 5 Barn. & Cres. 38, S. C. The decision is in point.

But this veteran practitioner having, as he believed, fought his way through the adverse legislation of nearly half a century, it is thought must at all events surrender a part of his claim under the new and point blank provision which found its way among the numerous alterations introduced into the revision of 1830. 1 R. S. 450, 2d ed. § 16. This section provides that no person shall practice physic or surgery unless he shall have received a license or diploma for that purpose from one of the incorporated medical societies in this state, or the degree of doctor of medicine, &c. ; or shall have been duly authorized, in a certain form, under the laws of some other state or country. The plaintiff below produced no license or diploma from any society. His certificates, it was objected, were neither of them technically such ; and if a license was necessary, he could only resort to the certificate of 1797. This latter was substantially according to the law of that day, and conferred a right which continued for life; unless divested by some disfranchising statute. The provision in the revised statutes is general. It prohibits all persons practising, unless they have the license required. It is not in terms confined to persons taking licenses after 1806, when, for the first time, medical corporations could be formed ; nor does it expressly say it means not to touch those who were previously licensed. There are classes to whom it may be equitably applied, probably most persons now in practice, for the granting of corporate licenses or diplomas commenced so early as 1806 ; *vide Sess.*

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Laws of that year, ch. 138, § 4 ; and was continued in the subsequent acts. *Vide 2 R. L. of 1813, 221, § 9 and § 21.* To these latter persons, according to the sound rules of construction, it should be confined ; and we think might be, if necessary. The statute can have ample scope, without working injustice to any one, *Dash v. Van Kleeck, 7 Johns. 477, and the cases there cited,* will be found full to the point that it should be so construed [*29] "as not to interfere with previously vested rights. *Timmerman v. Morrison, 14 Johns. 369,* is directly in point on a similar general provision in the medical act of 1813. 2 R. L, 219, 222, § 12.

But if it were necessary for the plaintiff below to renew his license, *non constat* that it was not done. Such a defect would reach but to the latter part of his practice in the defendant's family. He had been retained long before 1830, and continued to practice generally after that time. The presumption is, therefore, that he had obtained the proper diploma under the revised statutes ; in other words, renewed his license, within the principle of *Pearce v. Whale*, before cited. I refer to the case and reasoning of the judges, as in point, that to resist a claim of this kind, for want of qualification, it lies with the defendant to prove clearly that the person whom he retained and who performed the services, has not renewed his license. There he proved it had not been renewed in the king's bench. The court said he must go farther, and prove an omission to renew in the common pleas ; for a renewal in either court entitled the plaintiff to practice. *Vid. also 2 Phil. Ev. 72, 1st Am. from 7th Lond. ed. Also 1 Phill. Ev. ed. by Cowen & Hill, p. 227, and note, p. 298.* No attempt was made in the case at bar to disprove the fact of the plaintiff having a license. The express statutory declarations running through the various revisions, that any person practising without the proper authority, shall be disqualified to sue and collect any compensation for his services, do not vary the rule of evidence. They were but impositions of an additional penalty. None of the statutes declare on which side the *onus* lies. None of them profess to be statutes of evidence. We are left for that to the common law ; and on looking into adjudications in many cases precisely analogous in principle, it will be found that the defence labored throughout under the difficulty of assuming that the plaintiff was bound, in the first instance, to prove his license affirmatively ; whereas the law presumed that he had one, until the contrary was proved. The rule in such a case as this is more obvious and reasonable in its application, inasmuch as the defendant all along "admitted, by the very act of retaining the plaintiff, that he was a regular physician. There was no pretence that he was employed as a mere Sangrado, like a steam or root doctor. Such, I admit, would have been *prima facie* evidence that he was not legally qualified. *Vide Collins v. Carnegie, 1 Adolph. & Ellis, 695. Pickford v. Gutch, 8 T. R. 805, note. Moises v. Thornton, id. 303.*

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His account current, sustained by proof to the satisfaction of the referees, partakes too strongly of the *materia medica*, and other professional *indicia*, to leave a doubt that he was called and acted throughout as a regular practitioner. In short this character was openly assumed on one side, and virtually admitted on the other. The case is thus brought plainly within the principle of *Berryman v. Wise*, 4 T. R. 366, 7, already cited. There the defendant accused the plaintiff of swindling, and threatened to have him struck off the roll of attorneys. He sued in slander, the declaration reciting that he was an attorney. On the trial, upon not guilty pleaded, it was objected that he must prove himself to be an attorney in the usual way, by showing his admission, or proving a copy of the roll. But the court held the slander itself a virtual admission of his character, and that it was, at all events, enough to prove that he acted as an attorney. Buller, J. added: "In actions brought by attorneys for their fees, the proof now insisted on has never been required."

In any view which can be taken of the case, I think the judgment of the court below must be affirmed.

The other judges concurred in the result, without expressing any opinion on the question whether a physician can recover his fees without producing a license to practice.

Judgment affirmed.

*DUNNING vs. HUMPHREY & CLARK.

[*31]

In an action on an *attachment bond* where the party suing out the attachment has failed to recover, the plaintiff is entitled to recover, not only the costs of the defence in the suit before the justice, but also *damages* for the *seizure* and *detention* of the property.

A plea of *non damnicatus* as to part, and *tender* of a sum certain as to the residue in bar of the action, cannot be sustained.

DEMURRER to plea. The plaintiff declared on an *attachment bond* executed by Humphrey and Clark, on the commencement of a suit in a justice's court, by Humphrey against Dunning. The bond was *conditioned* among other things that if Humphrey should pay to Dunning, *all the damages and costs which he might sustain*, by reason of the issuing of the attachment, if Humphrey should fail to recover judgment in the suit, then, &c. The plaintiff averred that an attachment was issued, by virtue whereof his goods and chattels, to the value of \$800, were attached and kept and detained for the

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space of *sixty days*; that subsequently the suit commenced by Humphrey was discontinued, and thus he failed to recover therein. The plaintiff then avers that he was subjected to great expense, in his defence of the suit, and that the defendants in this suit had not paid all the damages and costs, &c. The defendants pleaded *non damnificatus*, except as to *ten dollars*, and as to that a *tender* before suit brought. To which plea the plaintiff demurred.

M. T. Reynolds, for the plaintiff.

S. Stevens, for the defendant.

By the Court, NELSON, Ch. J. The plea is bad, as the action is brought for the recovery of unliquidated damages. Besides the costs of defending the attachment suit, the plaintiff here is entitled to such damages as a jury may think he has sustained by the wrongful seizing and detaining [*32] of his property. If it was taken out of his possession, he may be entitled to the value of it; if seized and left in his possession, to such damages as may be awarded for the unlawful intermeddling with the property.

Judgment for plaintiff.

MAGHEE vs. KELLOGG and others.

Assumpsit lies to recover back money collected under a judgment subsequently reversed on error; and the action lies against the *real parties plaintiffs*, where the suit was prosecuted in the name of a *nominal plaintiff*: e. g. by assignees of a chose in action in the name of the assignor.

THIS was an action of *assumpsit* upon the money counts, tried at the New-York circuit in February, 1838, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The defendants, as the assignees of a judgment, recovered by *David Field* against *Emma Boyer* for about \$670 damages and costs, commenced a suit in the court of chancery, in the name of *Field* as complainant, but for their own benefit, against the plaintiff and others. In the bill filed it was alleged that a conveyance of certain lands, which had been made by Mrs. Boyer, the judgment debtor to the plaintiff in this suit, was fraudulent and void as against the complainant, who was a judgment creditor. The defendants in chancery, among other things, alleged in their answer that the judgment had been assigned to the defendants in this suit. Replications were

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filed, and orders to produce witnesses entered, but no proofs were taken by either party. In May, 1831, the cause having been brought to a hearing, the vice chancellor made a decree, declaring the conveyance from Mrs. Boyer to the plaintiff fraudulent and void, and directing the land to be sold, and the money applied, in part, to the satisfaction of the complainant's judgment and the costs of the suit in chancery. The land was sold under the decree, and in August, 1831, a part of the proceeds of the sale, amounting to \$995,73, was paid over to the solicitor employed by the defendants in this suit to carry on the proceedings in chancery. The solicitor retained "his costs, and paid over the balance, \$812, to the de- [*33] fendants. On appeal to the chancellor, the decree of the vice chancellor was, in May 1834, reversed; but the reversal was not to prejudice the title of the purchaser under the decree. It was further ordered that the plaintiff in this suit be restored to so much of the purchase money, as had been paid over to the solicitor as abovementioned. The decree was, in December, 1834, affirmed in the court of errors. The plaintiff then brought this action to recover the money which had been collected out of her property, and paid over to the defendants under the order of the vice chancellor. The defendants moved for a nonsuit, which was refused. Verdict for the plaintiff for \$1446,85. The defendants now move for a new trial on a case.

S. Stevens, for defendants.

J. Edwards, for plaintiff.

By the *Court*, BRONSON, J. It is settled, so far as this court is concerned, that money paid on a judgment which is afterwards reversed on error, may be recovered back in an action of *indebitatus assumpsit*, for money had and received to the use of the party who paid it. *Clark v. Pinney*, 6 *Cowen*, 287. But it is said in this case, that the action should have been brought against *Field*, the nominal complainant in the court of chancery, and not against the defendants, who were his assignees; and the case of *Lyman v. Edwards*, 2 *Day*, 153, is relied on by the defendants. That case has already been questioned in this state, *Field v. Maghee*, 5 *Paige*, 539, and I think we ought not to follow it. The courts in Connecticut have not gone so far as we have, in recognizing and enforcing the rights of the assignee of a chose in action: and if they look only to the nominal plaintiff when the assignee asks protection, the principle should be applied throughout, and the assignee should not be subjected to any burden. But in this state, nothing remains of the old doctrine that a chose in action is not "as- [*34] signable, but the formal remnant which requires the assignee to sue

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in the name of the original creditor. The rights of the assignee are recognized and protected as fully as though he were the plaintiff on record : and on the other hand he is liable for costs if the suit fails, and should, upon principle, be subjected to all the burdens which may result from the litigation. He is the real party ; and if we regard him as such when his interest requires it, common justice demands that he should be so regarded throughout. If we allow the assignee to say he is the owner of the debt, when the defendant sets up a discharge by the nominal plaintiff, there is no principle which will permit him to thrust forward the nominal plaintiff, when the defendant ultimately prevails in the litigation.

There is nothing in the case which will warrant us in saying, that this was a mere hypothecation or pledge of the judgment against Mrs. Boyer, by way of security for a debt due to the defendants from Field. Whether taken on account of a debt or not, it seems to have been an absolute assignment of the judgment, leaving no interest in the assignor : and although the bill to enforce payment of the judgment was filed in the name of Field, the suit was commenced by the defendants, and for their own benefit. When the money was collected under the decree, they took it ; and now, after the decree has been reversed, they must account to the plaintiff whose land was sold to raise the money.

But it is said, that it was adjudicated in the court of chancery that Field was the real party, and that the plaintiff is not now at liberty to assert the contrary. It is undoubtedly true, that the rule at law, that an assignee of a chose in action cannot, in general, sue in his own name, does not prevail in courts of equity ; and if the allegation in the answer that the judgment was assigned, had been proved, the chancellor would, no doubt, have dismissed the bill, or ordered the assignees to be made parties. But nothing was adjudged in the court of chancery on the subject, for the obvious reason

that the assignment was neither proved nor admitted in that suit.

[*35] The objection set up in the answer was a merely formal one. The merits of the controversy were precisely the same, whether the suit was prosecuted by Field, or by the assignees ; and I cannot think the plaintiff is estopped from asserting, that the defendants were the real parties in that suit, because she did not then persist in her formal objection, and compel the defendants to appear in their own names.

These are the only questions which were discussed on the argument.

New trial denied.

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DOUGLASS vs. HOWLAND.

Where one party agrees to account and pay over such sum as shall be found to be owing by him, and a third person *covenants* that the party thus agreeing *shall perform the agreement*, an action lies against the covenantor or *guarantor* without notice from the covenantee of the non-performance of the principal.

A decree in chancery against the principal, in a cause on a bill filed to *compel an account*, is not evidence against the guarantor, unless he had notice of the suit, and an opportunity given to defend in the name of his principal.

A *covenant* under seal, is not within the statute of frauds requiring an agreement to be in writing, *expressing the consideration*.

In a *simple contract*, the *consideration* must appear on the face of the writing, or in other words, be *expressed* by it ; but it need not be in any particular *form*—it is enough, if from the instrument, by reasonable construction, the consideration can be collected. Collateral facts or surrounding circumstances to which the promise has reference, may be looked at to give effect to the contract. A *consideration implied or inferred from the terms* of the instrument, is as effectual as if *expressly* appearing on its face.

A promise to answer for the debt, default or miscarriage of another, purporting to be made *for value received*, is a sufficient *expression of the consideration*, within the meaning of the statute ; the particular consideration need not appear ; it is enough that there be a consideration.

It seems that the doctrine of *notice of non-performance* applicable to *negotiable paper*, does not govern in the case of *guarantees*, where the *guarantor* undertakes *absolutely* that his *principal* shall perform. If it be intended that *notice* shall be given, it must be provided for in the contract ; otherwise, the *guarantor* must inquire of his *principal*. So also, it *seems*, that the same rule prevails in regard to *notice of acceptance of a guarantee*.

*THIS was an action of covenant, tried at the Herkimer circuit, [*36] in November, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

On the 2d September, 1838, articles of agreement were entered into between the plaintiff and one *George W. Bingham*, whereby it was mutually agreed that an account should be stated between the members of two mercantile firms which had theretofore existed, and in which *Bingham* had been a partner ; the plaintiff engaging to pay to *Bingham* such sum as upon such accounting should be found due to him, and *Bingham* engaging to pay to the plaintiff such sum as should be found due *from him*. On the same day, an instrument in writing, written underneath the articles of agreement, was executed under the hand and seal of the *defendant*, in these words : “*For value received*, I do hereby covenant and agree with the above named Benjamin Douglass, that the said *George W. Bingham* will well and faithfully perform on his part the above agreement.” On these instruments the action was brought. The plaintiff in declaring set them forth, and after averring performance on his part, of all the stipulations contained in the agreement on his part to be performed, alleged that *Bingham* was indebted to the said mercantile firms in the sum of \$1500 ; that he *would not account or suffer an account to be taken*, according to the tenor and effect of the articles of

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agreement, and wholly refused so to do ; that he, the plaintiff, was obliged to and did file a bill in chancery to compel an account. That such proceedings were thereupon had, that subsequently a decree was made in the court of chancery, adjudging Bingham to pay to the plaintiff the sum of \$836,-56, with the interest thereof from 6th August, 1835, together with the costs of the plaintiff to be taxed ; and which were subsequently taxed at \$200 ; of all which it was alleged the defendant had notice. He then alleged for breach, that the defendant had not caused Bingham to perform, fulfil and keep all things in the articles of agreement contained on the part of Bingham to be performed, fulfilled and kept, although often requested, [*37] &c. And so, &c. The defendant pleaded, 1. **Non est factum* ; 2. That Bingham *was not indebted* to the two mercantile firms in the agreement mentioned.

On the trial of the cause, the plaintiff read in evidence the *articles of agreement* set forth in the declaration, and offered to read the *covenant* of the defendant endorsed thereon, which was objected to by the defendant's counsel as being within the statute of frauds, and therefore void ; the objection was overruled and the covenant read. The plaintiff then offered in evidence the enrolment of the *decree* against Bingham, as set forth in the declaration, which was objected to as inadmissible, the defendant in this cause *not being a party thereto*. The objection was overruled and the decree read : from which it appeared that Bingham put in an answer, that he was *decreed* to pay the sum mentioned in the declaration, and that the costs were taxed at \$184,12. The plaintiff also read in evidence an exemplification of an execution issued upon the decree and a return of *nulla bona*, &c. Upon this evidence the plaintiff rested. The defendant's counsel moved for a *nonsuit*, upon the grounds : 1. That the covenant *not expressing any consideration*, was within the statute of frauds and void, although under seal ; 2. That the *decree* was not proper evidence to charge the defendant, he not being a party to the suit in chancery, and it not having been shewn that he had notice of that suit ; and 3. That no action would lie until after *demand* and *refusal* to pay. The motion was denied. The defendant then offered to prove that Bingham *was not indebted* to either of the firms mentioned in the articles of agreement specified in the declaration : the plaintiff objected and the proof was excluded. The counsel next insisted that the defendant was not liable for the payment of the costs of the suit in chancery ; but the judge ruled otherwise, and the jury under his charge found a verdict for the plaintiff for \$1235,07 damages and six cents costs. The defendant having excepted to the various decisions made against him, moved for a new trial on a bill of exceptions.

[*38] **S. Stevens*, for the defendant, submitted the following points :

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I. The covenant of the defendant, upon which this action is brought, is within the statute of frauds, and therefore void. *The consideration is not expressed in the covenant,* and the fact of its being under seal, does not take it out of the statute. 2 R. S. 135, § 2. *Rogers v. Kneeland,* 18 Wendell, 114. Where the statute directs what a written instrument shall contain to make it valid, such direction must be complied with, or the instrument is void. The addition of a seal to a written instrument does not and cannot supply the omission of words required by the statute to give such instrument validity. A seal, at most, only *implies a consideration* —the statute in question requires *the consideration to be expressed in the instrument.* Previous to the revised statutes, it was not necessary that the consideration should be expressed. If the court could *spell out the consideration,* or if it could be fairly *implied* from the contract, it was held to be sufficient. But the revised statutes have altered the law on this subject. Now the consideration must be expressed in the instrument itself. The court are not at liberty to spell it out, or imply it, if not expressed in the contract. *Packer v. Willson,* 15 Wendell, 343.

II. The defendant is not liable to an action upon his covenant to the plaintiff, until after actual notice of Bingham's default to perform the contract between him and plaintiff, and a special request or demand of performance by defendant. There is no time mentioned in the contract between plaintiff and Bingham, when it is to be performed. Consequently neither could sustain an action against the other upon that contract, without a special demand of performance, and reasonable time given. *Osborn v. Lawrence,* 9 Wendell, 135. *A fortiori,* the guarantor of Bingham is entitled to notice of default and demand of performance.

III. The circuit judge erred in admitting the decree of the court of chancery in favor of the plaintiff against Bingham, as conclusive evidence against the defendant: 1. The decree was not legal or proper evidence against the defendant, for the purpose. He was not a party or privy to it, or "to the cause in which it was made, nor had he any knowledge or [*39] notice whatever of it. He could not, therefore, be affected by it. 1 Phil. Ev. 222, ch. 2, § 1. 1 Starkie's Ev. 191, § 60. *Case v. Reeve,* 14 Johns. R. 79, 81. *Maybee v. Avery,* 18 id. 352. 2. But, at most, the decree was only *prima facie* evidence. It was not conclusive upon the defendant.

IV. The judge also erred in rejecting the evidence offered by the defendant. Under the issues joined in this cause, the defendant certainly had a right to give the evidence offered. It was simply offering to prove his second plea, and the evidence offered was legal, pertinent and proper, and should have been admitted by the circuit judge.

V. The defendant was not liable for the costs of the chancery suit in fa-

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vor of the plaintiff against Bingham. The judge therefore erred in deciding that the plaintiff was entitled to recover the amount of the taxed bill, with interest from the time of taxation.

J. A. Spencer, for the plaintiff, urged, I. That the covenant of the defendant was not within the statute of frauds: because, 1. The agreement was in writing, acknowledging a consideration on its face; 2. The seal imports a consideration *prima facie*; 3. It will be deemed a part of the original articles of agreement—the covenant of the plaintiff on a good consideration.

II. The enrolment of the decree in the court of chancery was properly admitted in evidence against the defendant. Howland had covenanted, *first*, that Bingham should account and state a balance; and *secondly*, that he should pay such balance to Douglass. If Bingham had accounted voluntarily with Douglass, and had struck the balance, can it be pretended that Howland would not have been concluded by it? Douglass compelled him to account by bill, and he did appear and account, and a balance was struck. Is he not equally concluded? There was no necessity to make Howland a party to the *accounting*, whether voluntary or compulsory. He had fully authorized the plaintiff to treat and account with *Bingham*.

[*40] III. The amount of recovery was right. The costs were damages consequent upon the breach of the covenant to state an account voluntarily. The whole amount found due on accounting are damages, because Bingham did not pay as he had covenanted to do when the account was stated.

By the Court, Cowen, J. The statute provides that, in the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party to be charged therewith: 1. Every agreement, that, by its terms, is not to be performed within one year; 2. Every *special promise* to answer for the debt, default or miscarriage of another person. 2 R. S. 70, new ed. § 2.

It is objected that though the guaranty of the defendant be subscribed by him, it is void as not expressing the consideration. I have no doubt that the words "for value received," are a sufficient expression within the meaning of the statute. *Watson's ex'res v. McLaren*, 19 Wendell, 557, 563. But the guaranty itself is not within the statute; therefore, there was no need of any such expression. The statute in terms speaks only of a *special promise* to answer, &c. The instrument declared on is a covenant, the seal of which imports a consideration. I know a doubt was thrown out, upon this point, by the learned chancellor, in *Rogers v. Kneeland*, 18 Wendell, 121. We

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think, however, without foundation, whether the words or the spirit of the statute be considered. It has been said in another case, that since the statute, where the guaranty is a simple contract, a more direct expression of consideration is necessary than under the former act. *Packer v. Willson*, 15 *Wendell*, 343. In that case, there was no consideration collectable from the words of the guaranty, within any of the English or American cases. The words were, simply, "I guarantee the payment of the within note in six months."

*So "I guarantee to you the payment of the above," written under [*41] an account current. *Bewley v. Whiteford*, 1 *Hayes' Irish Exch.*

R. 356. To imply a consideration in such cases, requires the merest straining of the fancy, and would be directly to overrule *Wain v. Warlters*, 5 *East*, 10, which held that a consideration must appear on the face of the writing; in other words, be expressed by it. That rule had been followed in England by allowing expressions more or less direct, but has never been overruled there. By the courts of some of the neighboring states, the rule had been questioned, and indeed repudiated, as not within the old statute, and it did not pass without some question even in England. In such a posture of things, to remove all doubt of its being adhered to, the legislature, when they came to revise the statutes, enacted the rule. The difference between the old and new statute, as mentioned by the revisers in their note, is "the requiring the consideration of the agreement to be *specified*." 3 *R. S.* 656, 2d ed. The marginal note to *Wain v. Warlters* is, that the agreement was holden void, because the consideration was not *stated*. Whether we say it must be *expressed* as in the statute, *specified* as in the notes, or *stated* as in *East*, it appears to me the intent must be the same. The principle is, that the consideration, being an important part of the agreement, should be made apparent in writing, as well as the promise. That either should be *expressed* in any particular way, is contrary to the analogy of the law, which requires courts to construe the language of all contracts according to the intent of the parties, and at the same time with the view *ut res magis valeat quam pereat*. That in any of them, we must often labor to find the intent, is true. In the language of Tindal, Ch. J. in *Morley v. Bothby*, 10 *Moore*, 395, 3 *Biny*, 107, *S. C.*, which in *Packer v. Willson* is doubted for law with us, how often are we put to find the meaning by *fair inference* from the language, or as it were, to *spell it out*. The latter is but a figure of speech; but if taken literally, does it follow that the consideration is the less *expressed* because we are obliged to *spell out* the meaning? All that Tindal, Ch. J. declared, was but another mode of saying that this "part of the contract is open to [*42] the rules of construction the same as the other parts. The commencement of his very phrase is, "If you can, by reasonable *construction*, collect from it the consideration, it is enough." A thing is not the less *express*

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ed, because it might have been plainer. The legislature do not enact it shall not be obscurely expressed, nor could they with any propriety till human nature is remodelled. They prescribe no exact form. It may be in figures, abbreviations, in a foreign or dead language; defective in spelling or syntax, elliptical, ambiguous. Some of the most difficult cases on the rule respecting the *ambiguitas latens* of written contracts, have arisen on these guaranties. You are to see what they mean in such case by looking to collateral facts, or surrounding circumstances. You do this in order to sustain the most solemn contracts, such as deeds or wills. An abbreviation may be explained by an expert. Even records and judicial proceedings are often quite obscure, till you look abroad and connect them with what they are speaking of. Are all these and the like analogies to be violated, because the phrase to be construed happens to make part of a contract under the statute of frauds. I agree that *Rogers v. Kneeland*, 10 *Wendell*, 218, 250, presents, both in the case itself and the books cited by Mr. Justice Nelson, a fair specimen of the English construction under the rule in *Wain v. Warlters*. *Rogers v. Kneeland* raised a question of latent ambiguity. The expression of consideration was to be made intelligible by looking out of the contract in question for other transactions and contracts, express or implied, to which the guaranty had reference. In commenting upon the English cases, Mr. Justice Nelson observes: "A consideration implied or inferred from the term or language of an instrument, is in judgment of law contained in it." What is this but saying it is *expressed*, perhaps in a general way. You say a man made a *feoffment*: that is saying he made *livery of seizin*, though the latter words are not used. *Feoff-*
[*48] *ment* implies *livery*—therefore, the latter is expressed just as well and better than if the word *livery* had been used. Whatever then may be fairly implied from the language is *expressed*. I will add the cases cited in *Fell on Guarantees* 42, *Theobald*, 13, and especially the late case of *Shortrede v. Cheek*, 1 *Adolph. & Ellis*, 57, decided since *Rogers v. Kneeland*, but in the same spirit. The former is cited by Mr. Wigram as a striking illustration of the length to which courts will go in looking to surrounding circumstances, with a view to apply the words of a guaranty. *Wigr. Extr. Ev. addendum before p. 1, Lond. ed. 1835.* That case related both to the *expression* of consideration and *promise*. It was insisted that the writing should be so plain as to supersede the resort to parol testimony. But the court resorted to precisely the same rule for deciphering the meaning as they would in respect to a will. Mr. Wigram puts the case by the side of one on a will decided in the court of chancery. "The result of all," says Joy, Ch. Baron of the Irish exchequer, after a very full review of the cases as they stood in 1832, "is, that the consideration must clearly appear upon the guaranty itself, either by *express* statement or *necessary implication*." 1 *Hayes' Rep.* 364, in *Bewley v. Whiteford*, before cited.

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I have said so much, because I perceive, not only from what was said in the argument of this cause, but what has fallen from the bar on several other occasions, that when we come to agreements depending on the statute of frauds, it is supposed that all our powers of construction are paralysed; that the words "*expressing* the consideration" must have a meaning different from the same words had they been used to define the requisites of any other instrument. I answer, you cannot escape the power of construction, so long as you have a judicial system. The very position contended for involves the power. What, is such an *expressing* so direct, as to leave no room for exerting the power? The answer itself must say, "According to my construction of this clause, it is to plain to admit of *construction*, or so obscure as to require it." The argument, if allowed, would only give the power another direction, by putting it to follow ^{*}the rules [*44] furnished by Johnson or Murray, instead of the rules of law; to raise a verbal or grammatical construction instead of a legal one. We were told on the argument, for instance, that the words "for value received," used here, will not satisfy the statute, although confessedly good in all other contracts under the sun. Why not? The learned counsel replied to that question, "we admit they express *a* consideration; but not *the* consideration. The statute, you will observe, uses the word *the*, not *a*." It is said the construction of the statute of frauds has already cost several millions of pounds sterling; and if the new road of construction on letters and articles be once opened, it is to be feared that a still greater expense will not be the worst evil. There is hardly a contract on earth, nor can there be under the statute of frauds, that would not be open to attack. Business men and courts of justice are unmoored; and litigation becomes interminable. Let us judge of this by the history of the statute before us. That was thought to have been drawn as *expressing* the intention of the legislature. It is said by *Lord Ellenborough*, 10 *East*, 17, to have been drawn by Lord Hale, "one of the greatest judges," he adds, "that ever sat in Westminster Hall, who was as competent to *express*, as he was able to conceive," &c. Yet under all these advantages, nearly a century and a half had elapsed, when *Lord Ellenborough* was speaking, (A. D. 1804,) before the meaning of Lord Hale's *expression* had been settled; and construction, at the end of nearly two centuries, is still going on. If, in construing the *new* words which have lately found their way into the statute, we must have *new* rules, and these be adapted to the infinitely various modes by which men of all sorts may choose to speak, we must submit to the consequences, be they never so onerous. I will only say, that we ought not, without strong necessity, to surrender the degree of approximation towards certainty, which we may otherwise claim to have been made. Rules of construction make the law as well as the statutes; and lightly to depart from them without necessity, would be to incur

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[*45] the denunciations of Lord Hale himself, against precipitate and inconsiderate innovations in the law. "There *is*," says he, "that contumacy, as I may say, of most laws with others, that it may be of great importance, that while men over-hastily and unwarily go to make an alteration in that which they conceive amiss in a small matter, they may endanger a part of the main fabrick." *Hargr. Law Tracts*, 257, 261, 2 *Dubl. ed.* 1787. Once give up the rule that a reasonable construction shall be applied to effectuate the expression in a written guaranty, and courts will soon be called on for the same strictness in passing on all other instruments. Every thing that has been done towards settling the meaning of men's contracts may thus be disturbed. There is no uniform mode of expressing things. We have held again and again that a seal expresses a consideration, within the meaning of the statute. It expresses it in the same sense that Lord Hale's word *agreement*, in the statute itself *expressed* a consideration. The word *imports* a promise with a consideration annexed. The seal *imports* a consideration. I say such a man has made a *contract*; I express both consideration and promise, as plainly as if I had enumerated both in so many words. The term *contract* being complicated of both, expresses both. It conveys to the mind a complex idea. So of every general word. Its compass of *expression* is wider than if it aimed at a simple uncompounded idea. It then *expresses* parts or elements.

There are besides well known rules in the construction of statutes, which ought not to be departed from. Where the statutes are in mere affirmation of the common law, the course of adjudication is not altered by them. The rule clearly includes any new statute which may have been enacted in affirmation of judicial construction upon a former statute. Nor ought the new enactment to be holden a deviation from the former law, unless it be obviously so. There is scarcely any branch of legal policy more worthy of being enforced than that which aims to keep the laws of a nation the same in all respects, from one age to another, except in points where change becomes absolutely necessary. Time, says Lord Hale, is wiser than all the wits in the

[*46] world; and the law which has been tried by it, has the highest possible evidence in its favor. Time, too, is the school master which teaches law most effectually, and without which it cannot be generally known. It must, I think, have been remarked by every lawyer who has examined the present revised statutes, that a great deal of them is made up of enactments intended merely to repeat what had been decided by our own or the English courts. That was not always done in the language of the reports, as we have seen it has not been done in the enactment of *Wain v. Warlters*. The same thing may be said of many mere rules of court. It is equally true of the old statutes themselves, wherein changes of some kind occur at every step in the revision. All the general acts were

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remodelled. An arrangement more scientific, a style improved in elegance and simplicity were sought to be introduced throughout the whole. Hence, short paragraphs made up of short sentences; generalities, ellipses, implications, equivalent words, or translations for old and well defined technical terms. In short, the old costume was dismissed, and that of the civil code of France adopted, as nearly as could be. Yet I take it that the main substance of what we had before, was always intended to be retained. The revision was mainly a reenactment or codification of the substance, the principle of what we had before, though I admit the identity cannot easily be ascertained in very many instances. To do this with the least hope of success, both the old and the new systems must be studied and compared, aided by the revisers' notes and their marginal references. The object is worth all the labor it costs; for when once attained, we have the explanations of the old system to aid in understanding the new one. It cannot be, that the formal changes I have mentioned, mean a change in substance. The transmutation of a principle of the common law, or a rule of practice into a statute, or an old statute or its received construction into a new one, without a palpable design to depart from the former, ought not to be considered as a departure. We are thus left where we were with all the old helps about us; the old lights burning. To pursue a contrary course, would be to love darkness rather than light. It seems to me that the rule settled by our venerable predecessors "in respect to the revision of old statutes, applies with full force to a revision and enactment of any branch of the law. It was thus laid down by Chief Justice Kent and Mr. Justice Spencer: "Where a law, antecedently to a revision of the statutes, is settled, either by clear expressions in the statutes, or adjudications on them; the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change." *Yates' case*, 4 Johns. R. 359. *Taylor v. Delaney*, 2 Caines' Cas. in Er. 150, 151. "A contrary construction," says the last case, "might be productive of the most dangerous consequences. The quaintness of expression in some of the ancient British statutes, the circumstance of there being several statutes on the same subject, required in many cases an entire change of language; but it has never till now been contended, that thereby an alteration of the law was to be inferred." *Per Spencer, J.* in 1805. In this, Kent, Ch. J. himself one of the revisers of 1801, concurred, and repeated and enforced the rule in *Yates' case*, A. D. 1809. If a contrary course would be most dangerous in 1805, when as yet revision had proceeded by cautious and prudent steps, fearful to go even beyond a change of orthography, what shall we say of an age when there is literally a mania for changing every law in some way? If Lord Hale, of mighty intellect, and giant frame, which enabled him to labor 16

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hours out of 24, in its improvement, could not draw a single new statute capable of being well understood and usefully applied, short of two centuries and millions of expense, how very important is it, that, among many entire enactments and many interpolations confessedly novel, the old and familiar parts of the system should not be confounded with them. By care in this respect, much evil may be averted. Lord Hale compares the man who is ravenous for much legislation, to him "that will for every small matter be altering of his house. As he will ever be meddling and never be at rest; so he may, before he is aware, endanger the whole fabric, while out of an

[*48] over curious nicety he is impatient of every little defect." The rule adopted by our predecessors will at least mitigate that evil.

It will serve as a prop to those parts which were not intended to be displaced, while it will leave every thing really new to perform its appropriate functions with less injury to the general system. It would be equally idle, as out of season, to reiterate the scathing denunciations of Lord Hale against a spirit of legislative tampering. No one, not ambitious of a failure, would oppose himself to an earthquake like that which he resisted, even though it were raging with greatly mitigated fury. The evil, if it be one, is upon us. If the building totter, we can only act the part of humble mortals, by propping and tying it. Hale has been compared by a distinguished American orator, to a descended god. Such a being could reach and subdue the power which shook the foundation of the building. The creed which he promulgated will not be without its use, however, as fortifying the rule adopted and acted upon by our predecessors. Both are but commentaries on the maxim *via antiqua via est tuta*.

The second point now made by the defendant is, that no notice of Bingham's default was proved. The breach was in refusing to account, and to pay the money on the decree, though the plaintiff had done the several acts on his part required as a condition precedent to Bingham's liability attaching. Under such a state of things, it is not denied that Bingham himself was liable; and the defendant covenants that he should perform and fulfil his obligations. If the defendant were liable at all, he was so without notice from the plaintiff. It is a general rule, that where one guarantees the act of another, though on condition, his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the latter. Both must take notice of the whole at their peril. *Somercall v. Barnaby, Cro. Jac. 287.* *Atkinson and Rolfe's case, 1 Leon, 105.* These were cases of a promise to indemnify against liabilities to be incurred for another; and it was held that no notice of their being incurred was necessary, or that they had been paid. So where the defendant promises to pay [*49] what should appear to be due from the plaintiff to his attorney. *Pitman v. Biddlecombe, 4 Mod. 280.* In *Smith v. ——, 11 id.*

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48, Holt, Ch. J. said, where either party can obtain notice on his own inquiry, there, none need be given. 2 *Salk.* 457, *S. C., nom. Smith v. Goff. Harris v. Ferrand, Hardr.* 86, *S. P.* In *Brookbank v. Taylor, Cro. Jac.* 685, the promise was, that the defendant would pay the plaintiff the rent due from another, if the latter did not pay it. Held that the defendant must notice the non-payment at his peril. *Williams v. Granger,* 5 *Day,* 444, *S. P.* In all these and the like cases, if the defendant intend to insist on notice or request, he must expressly make it a condition of his contract, as was done in *Berke v. Tippet,* 1 *Saund.* 32. Without such a precaution, the engagement is considered as absolute to pay on the happening of the condition. This was held of a promise to repay the plaintiff £20 if he disliked the article for which he had advanced the money. *East v. Thoroughgood, Cro. Eliz.* 834. This case I admit to be questionable, as the condition was a secret, lying in the plaintiff's own breast; and the contrary has been several times resolved, and seems to be settled, because the matter lies not only more properly but exclusively in the plaintiff's own knowledge. *Comyn's Dig. Plead. C. 73, Condition L.* 8, 9. *Brable v. Hollywell, Cro. Eliz.* 250. *Henning's case, Cro. Jac.* 482. *Holmes v. Twist, Hob.* 51. 1 *Rol. Abr.* 463, *S. C. at pl.* 15. *Id. pl.* 18. But in the case at bar, the defendant had only to enquire of his principal, for whom he had undertaken absolutely that he should perform. The case is, therefore, stronger against him than any which have been cited. And the familiar one, of an award. If the submission expressly require notice, it must be given; otherwise the party must enquire of it, and pay the sum awarded at his peril, even though the whole proceedings were *ex parte.* 1 *Chit. pl.* 286, *Am. ed.* of 1828; *Harris v. Ferrand, Hardr.* 42; and see 1 *Saund.* 33, note (2) and the cases there cited; *Comyn's Dig. Plead. C.* 69.

I am aware that there are a class of cases which hold that under a contract guaranteeing a debt yet to be made by another, the guarantor is not liable to a suit without notice that the guaranty has been accepted and acted upon. Indeed, they go farther: if notice of accepting the guaranty be not given within a reasonable time no debt whatever arises. *Babcock v. Bryant,* 12 *Pick.* 188. I will only say, that these cases have no foundation in English jurisprudence, where the adjudications are numerous, and clear the other way. *Harris v. Ferrand, Hardr.* 86. 42. In *Comtit. Plead. C. 75,* it is said on a promise to pay, on the performance of an act by the promisee to a third person, the promisee need not give any notice; for the promisor takes it on himself to get notice at his peril. And *vide* as to a guaranty of a debt already due, *Warrington v. Furbor,* 8 *East,* 242; *Swinyard v. Bowers,* 5 *Maule & Selw.* 62. All the cases requiring mere *guarantors* to be treated as *endorseers*, rest on *dicta* of two distinguished

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American judges, in cases of a mixed character, where the defence, it was agreed, would be complete, independent of any such ground. *Marshall, Ch. J., in Russell v. Clark's ex'rs*, 7 *Cranch*, 69, 92. *Story, J. in Cremer v. Higginson*, 1 *Mason*, 323, 340, and *Russell v. Perkins*, *id.* 368, 371. *Rapel v. Bailey*, 3 *Conn. R.* 438, the counsel cited no English books; and all the learned court found there, was one case, in which they remark that Eyre, C. J. seemed to have been of opinion that, in guarantees for good behavior, notice of any embezzlement ought to be given in a reasonable time. *Peel v. Tatlock*, 1 *Bos. & Pull.* 419. The decision was finally rested on the dictum of Chief Justice Marshall, and was very strong in favor of the guarantor. It was on a guaranty to pay for goods deliverable to another, on such terms as the guaranteee and the principal should agree on, if the principal did not pay; and though strictly followed by a sale and delivery to the principal, and a default on his part to pay, yet it was held that no action would lie; at least, till notice of the circumstances had been given by the plaintiff to the surety. Other cases hold guarantees of this character to almost the same degree of strictness in giving notice to guarantors, as the law merchant has introduced between endorsees and endorsers.

[*51] *Green v. Dodge*, 2 *Ham. R.* 430, 439, 440. *Norton v. Eastman*, 4 *Greenl. R.* 521. In the latter case, a like principle was imputed to a decision of this court in *Stafford v. Low*, 16 *Johns. R.* 67. The latter, however, merely holds that a declaration made to another of a willingness to become a guarantor, if required, would not render the declarant liable as a guarantor, without a compliance with the *express condition*, which means giving notice. In short, that the letter on which the plaintiff based his claim, did not amount to a guaranty. *Id.* 69, 70. *McIver v. Richardeon*, 4 *Maule & Selw.* 557, was there cited as a case of similar character. *Beekman v. Hale*, 17 *Johns. R.* 134, puts both of the former cases on that footing, and acts upon them, adding, there must be notice or a subsequent consent to become a guaranty. Such cases are exceptions to the general rule, that notice is not required. They are cases of express condition, like *Birks v. Tippet*, already cited from *Saunders*. And *vide 1 Saund. 33, note (2)*. *Com. Dig. Plead. C. 69*. It is proper to say that this place in *Comyn's Digest* is cited by *Putnam, J. in Babcock v. Bryant*. But the cases cited by *Comyn* are like those in the note to *1 Saund. 33*, where the request or notice is expressly required. "There," says *Sergeant Williams*, "the request is parcel of the contract." All the cases cited by him are of collateral matters, to be done on request, by the very words of the contract; and even these cases do not extend to a proper debt or duty of the party promising. There though he by words, make the request or notice a condition, yet the bringing of the action is a sufficient notice, and such is the very first case cited in the note. *Yelv. 66*. *Vide Com. Dig. Plead. C. 70*.

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I forbear to search farther for the English law, after the admission implied by *Douglass v. Reynolds*, 7 Peters, 113, 125. The question was there examined by Mr. Justice Story. The only English cases cited by him, are *Oxley v. Young*, 2 H. Black. 613, and *Peel v. Tatlock*, the latter being also noticed, as mentioned before, by the supreme court of Connecticut. In *Oxley v. Young*, the surety was holden liable; and I do not find any countenance given to the "idea, that notice was necessary by [*52] way of condition. The defendant ordered goods for another, and guaranteed that he should pay for them. They were accordingly shipped to him by the plaintiff, the guaranteee. It is true that notice of the shipment was given to the defendant; and he sought to raise a defence, on the subsequent neglect of the vendor. Eyre, C. J., said the right to sue on the guaranty attached, when the order was put in a train for execution, subject to its being actually executed; and the right could not be divested, even by the wilful neglect of the vendor. As to *Peel v. Tatlock*, it has been impossible for me to perceive that even an intimation was intended of notice being essential. The difficulty felt by Eyre, C. J., seems to have been, whether the creditor had not defrauded the guarantor by industrious concealment. I may then I think repeat with great confidence, that all the cases requiring notice are American, and depart from the rule of the common law. *Douglass v. Reynolds*, as Mr. Justice Story observed, may be sustained by the *dictum* of Chief Justice Marshall; and indeed by *Edmondstone v. Drake*, 5 Pet., 624, where the court, with that learned chief Justice at its head, carried the *dictum* into a *direct adjudication*. No English case is claimed by Mr. Justice Story, in any of his decisions, as sustaining the doctrine in the least. C. J. Marshall does not even cite one, in his opinions.

The short answer which English cases, decided long before our revolution, furnish, is, that the guarantor, by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly, whether the guaranty were accepted, the conditions fulfilled and payment made. Where that can be done, the cases all hold that notice is not necessary, even as preliminary to the bringing of an action, much less to found a right of action. The only exception is the well known one of collateral parties to bills of exchange or promissory notes. *Vid. Philips v. Asting*, 2 *Taunt.* 206.

Thirdly, it is strenuously insisted, and, as I think it will appear, with great propriety, that the decree was not evidence against the defendant. Standing as it did against Bingham alone, it was certainly not evidence, *proprio vigore*; and, if receivable at all, it must be on the ground that the defendant has made himself privy to the suit in equity, by his covenant. All those cases, therefore, cited on the argument to show that one man cannot be affected by a judgment, or decree against another, who is not privy to it, may be dismissed at once, for all purposes, except as shown

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ing the reason why that is so. The objection is, that the party sought to be affected had no opportunity to examine witnesses, or in any way litigate the matter in controversy, either originally or by appeal ; and may, therefore, be wronged beyond measure, by others proceeding collusively behind his back. 1 *Phil. Ev.* 821, *Cowen & Hill's ed.* *Case v. Reeve*, 14 *Johns. R.* 79, 81. *Maybee v. Avery*, 18 *Johns. R.* 352. 1 *Stark. Ev.* 217, *Am. ed.* 1837. It is admitted in the books cited, that the verdict is not only evidence against the immediate parties : but against *all claiming under them* ; which very nearly expresses the meaning of the word *privy*, when used to signify those persons off the record, who may be affected to the same extent as if they were parties. It means any one who takes the subject matter of litigation, after the suit is determined, or, in some cases, while it is pending. He is either a *privy in blood*, as an heir on whom the estate in litigation descends ; a *privy in estate*, as one who takes by conveyance ; or a *privy in law*, as one who takes a right of dower. 1 *Phil. same edition*, 321. In all these cases, the reason is obvious ; the heir, purchaser, &c. always come in subject to any act or default of the predecessor, by which the title may have been affected. But, subject to this exception, the law is extremely jealous of the rights of all who are not actual parties, even though they may appear and be made so. Thus, in a suit against one of two joint-debtors, were it not for the statute making the judgment evidence to a certain extent against the other, it cannot be doubted that the proceeding would be altogether nugatory, for the purpose of establishing the truth of the claim against him ; although it might, in a suit for contribution, be received, as

every record may, against whatever person, to prove *rem ipsam*. 1
[*54] *Stark. Ev. Am. ed.* 1837, p. *215. *Vid. Deering v. The Earl of Winchelsea*, 2 *Bos. & Pull.* 270. Come then to the surety of a debtor. Suppose the now defendant's name to have been signed to the original covenant of Bingham. If he would not, standing there, have been bound by a suit and judgment against Bingham *alone*, with what propriety can he be held bound in a like proceeding here ? In either case what is the covenant ? That Bingham should account and pay over the balance found due ; not that he should, on default, abide any decree in chancery, or judgment at law for not accounting. With what propriety can it be said the defendant has incurred a greater liability by a separate guaranty, than he would by joining in the covenant ? May he not say, when the plaintiff comes with his decree, *non hæc in foedera veni* ? Is there any thing in the nature of suretyship, which, at the common law, gives to this decree the force contended for ? By the civil law, he would be bound. 1 *Evans' Poth.* 562, *Lond. ed.* of 1806. *Laralde v. Derbigny*, 1 *Mill. Lou. R.* 85, 91. The reason given by *Pothier* is thus : " In consequence of the obligation of the surety being dependent upon that of the principal debtor, the

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surety is regarded as the same party with the principal, with respect to whatever is decided for or against him." Again : " But the surety is allowed to appeal against this judgment, or to form an opposition to it, if it be in the last resort." Here is a reason founded both in the nature of the obligation, and the right to litigate the demand. So that, even at the civil law, a decree would be no more than *prima facie* evidence. At common law, where the guaranty is entirely collateral, as in the principal case, there is neither a right to litigate originally nor to appeal. Had the defendant gone into the court of chancery, he would have been dismissed as an intruder, on an objection by the complainant.

It is true he might so have framed his contract as to have undertaken for the decree : like special bail engaging for their principal ; or there may be an express stipulation *in pais* that the principal shall abide the event of the suit, as in *Patton v. Caldwell*, 1 *Dall.* 419. Something of the same nature are bonds of indemnity against actions, and cases, as [*55] *Duffield v. Scott*, 3 *T. R.* 374. There an action and recovery against the obligee were held conclusive, even without notice, that not being expressly provided for in the bond. A *fortiori*, where notice has in fact been given. The case most familiar to us, is a limit bond, whereof it has been held that notice to indemnitors and a chance to defend shall render the judgment against the obligee conclusive in an action to recover over. *Kip v. Brigham*, 6 *Johns. R.* 158, 159. 7 *id.* 168, *S. C.* Codified, 2 *R. S.* 254, 2d ed. § 52. The same may be said of a warrantor of title. 6 *Johns. R.* 159, and cases cited there. The obligation of the sureties in a probate bond, that the administrator shall account, has been construed to mean an accounting in the proper court, and thus the decree has been let in as at least *prima facie* evidence against them. This is given as the result of various South Carolina cases, cited in *Cowen & Hill's Notes to 1 Phil. Ev.* p. 984. Such would it of course be, with all that class of bonds, so numerous in our present system, by which sureties expressly bind themselves that the principal shall abide the event of a suit ; as to pay costs, or principal monies to be recovered, or return goods in replevin, &c. &c. Indeed, it is here plain, from the nature of the agreement, that the surety means to be concluded, always saving the right, as the law must in every case where a suit is between third persons, to contest the proceeding on the ground of fraudulent collusion, for the purpose of charging the surety. In *Hobbs v. Middleton*, 1 *Dana*, 176, 179, the court of appeals in Kentucky gave this effect to a judgment against a principal in an administration bond. Whether there be a clause in such a bond, which may, as in South Carolina, be construed specially to bind the surety, does not appear from the case. The court remark, that " the responsibility of securities, being incidental and collateral to that of the principal, a judgment in favor of a creditor, against

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the administrator, "concludes the securities as to the existence and character of the debt, thus ascertained, and cannot be questioned or reviewed on the official bond." Of course the court except cases of fraud. *Vide* [*56] also *Fountleroy v. Lyle*, 5 Monroe, 266. If the remark cited be intended of sureties in general, who engage merely for their principal doing some act *in pais*, it would go beyond any other case I have seen under the system of the common law. The doctrine has been denied in an action against the sureties of a sheriff, both in Pennsylvania and Virginia. *Carmack v. The Commonwealth*, 5 Binn. 184. *Munford v. Overseers of the poor of Nottoway*, 2 Rand. 313. In the *State of Ohio v. Colerick*, 3 Ham. R. 487, the judgment was, in such case, holden to be *prima facie* evidence, impeachable for collusion or mistake. Nearly the same effect seems to be collectable from the cases already cited from the Pennsylvania and Virginia reports, and other cases in the latter. *Jacobs v. Hill*, 2 Leigh, 898. In the latter case, even a judgment by voluntary confession was holden to have this effect. The earlier cases in Virginia will be found cited and commented upon in *Munford v. Overseers, &c. of Nottoway*. These cases, from Ohio, Pennsylvania and Virginia, hold the distinction, especially those of the two former states, that the judgment is either *prima facie* or *conclusive* evidence, according as the surety may or may not have had notice, and an opportunity given him to defend, which, of course, he may do in the name of the principal, with the consent of the plaintiff. In the latter case, nothing is more reasonable. It brings the case to the ground of the civil law, and is we have seen, countenanced by our own adjudications. Independent of that, however, independent of any clause specially binding the surety to pay judgments or decrees against his principal, independent of the identity and right of defence and appeal, which the civil law imputes to and confers upon the surety, it may, with great confidence, I should think, be asked, ought the surety to be farther affected than the merest stranger? This question, I perceive, has been answered in the negative even by a court sitting under the civil law system, where the surety did not happen to be in such a posture as subjected him to the general effect of *res judicata* against the principal, under that system. One had become bound for the plaintiff to indemnify the defendant against loss by an attachment against him, [*57] if it should not be prosecuted to effect. It was not, and "damages were in a distinct suit, recovered against the principal without notice to the surety. In an action against the latter, the court below received the record of recovery as evidence, *per se*, against him. But on appeal, the judgment was reversed: Derbigny, J. remarking, "there is no rule in our laws better understood, than that which allows the surety the right of availing himself of the same means of defence, (save those that are merely personal,) which the principal debtor could resort to. That princi-

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ple is founded on the sacred maxim, that no one ought to be condemned without being heard ; and that consequently no person shall be bound by a judgment to which he is not a party.” *Lartigue v. Baldwin*, 5 *Mari. Lou. Rep.* 193. In this case too the record had been received by consent. But to that the learned judge gave the answer, that it was admissible for the purpose of showing the principal had been sued, and an execution against him had proved unavailable ; but that the judge *a quo* had improperly allowed to it any farther effect. For the purpose of proving the damages sustained, it was held entirely incompetent—no notice having been given, or opportunity for defence extended to the then defendant. This seems to us the reasonable distinction. In general it imposes no hardship on the plaintiff. He has but to serve a notice, with a consent that the surety may take up the defence, and hold all the rights of the principal in that respect, so far as the defence by a surety is admissible. In some cases, as is well known, it may be wider than that of the principal, as where time may have been improperly given by the creditor, or the claim is, in character, without the terms of the bond. The case which occurs to me is a debt charged against one as administrator, which is in fact due from him as an individual. It will of course be narrowed, where the defence of the principal is personal, as being founded on infancy or an insolvent discharge. In the very case before us, I perceive that the account of Bingham was agreed by the articles between him and the plaintiff, to be adjusted on certain specified principles ; whether more confined than those upon which the court of chancery proceeds, it is not necessary to inquire, though I imagine it [“58] would not be difficult to show that in some aspects of the matter, the agreed principles were more confined. How are we to know from the sweeping evidence of the decree, that the stipulated measure of the account may not have been entirely overgone ?

But I forbear to pursue the farther examination of the question upon principle ; and I do it the rather, because I perceive the very point has been decided, after an examination which seems to me entirely satisfactory, by two learned courts, one in Maryland, and the other in North Carolina. *Beall v. Beck*, 3 *Harr. & McHen.* 242. *Keller v. Bowell*, 4 *Hawks*, 34. The first was an action on a bond for the faithful performance of a deputy sheriff, who had been sued and a recovery had against him alone in a defended suit. On this being followed by an action against the surety, the recovery was held by the court of appeals, not admissible in evidence against him. The argument of the court is not given. The latter case was an action against a surety on his bond conditioned for the faithful performance of his principal as guardian. A decree had passed against his principal’s administrator, in the probate court, on a petition for an account, answer and proofs taken. The decree was *de bonis intestati* and had been followed by a *j. fa.*

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and return of *nulla bona*. These proceedings were offered in evidence at nisi prius, as *prima facie* evidence in the suit against the surety, but rejected ; and the plaintiff nonsuited. A motion at the bar of the supreme court, to set aside the nonsuit, was denied. The cause appears by Mr. Hawk's report to have been well argued ; and chief justice Taylor, who delivered the leading opinion, based the decision on a full consideration of the English cases as they then stood, and their grounds as compared with the reason of civil law for coming to a different decision. The authority of the case in this court decided on a limit bond is reviewed ; and not disapproved, merely because notice was there given. The opinion of Hall, J. in the same case is a very handsome summary of the arguments bearing upon the question. Both

[*59] the learned judges advert to the analogy which repudiates the *admissions* of the principal as evidence "when offered to affect his surety. How perfectly well settled that notion is, both at Westminster Hall, and by a majority of the American courts, where the admission is not a part of the *res gestæ*, I have endeavored to show in *Cowen & Hill's 1 Phil.* note 485, p. 669.

I do not deny what was said at the bar, that, had Bingham voluntarily accounted on the principle prescribed by his covenant, the surety would have been liable for the balance struck. The striking of such a balance would be an admission making part of the *res gestæ*. Indeed, that, and every act leading to or connected with it, would be the *res gestæ* themselves, for which the defendant undertook in his covenant. The distinction will be found fully presented and illustrated by the cases cited in the note to which I have just referred.

It follows, *a fortiori*, from what has been already said, that the remaining grounds taken at the circuit and repeated at the bar, are more than sustained. These are, that, at most, the decree was *prima facie* evidence ; that the defendant should have been allowed to show, under the second plea, that his principal was in fact never liable ; and that the defendant was at all events, not liable for the costs of a chancery suit, litigated without his being in any way privy to it, or having had a chance to defend.

That a surety, upon a general undertaking for his principal's paying a debt, can be made liable in any way for the costs of a suit against the latter solely, seems to be a somewhat extraordinary position. A man endorses a note, or signs a guaranty for payment ; not of costs ; but the debt ; what authority has any court for adding *costs* to the words of such a contract ? The case at bar is nothing more in principle. Bingham covenanted to account and pay the balance. He owed two things ; the accounting and paying. These made the debt. The defendant covenants that Bingham shall perform both ; in other words discharge his debt ; not that he should pay

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costs. The latter obligation is without the bond. *Knight v. Hughes, Mood. & M'Kl. 244,* has some bearing in its principle. Lord Tenterden, C. J. The distinction is well illustrated by a "common bond" [*60] of indemnity, which you take against actions. There the obligor would doubtless be liable for costs, because they are directly incident to the action. They are virtually expressed by the bond. And yet for more abundant caution, costs are usually added ; such was the case of *Duffield v. Scott, 3 T. R. 374.*

A new trial is granted, the costs to abide the event.

LADUE vs. SEYMOUR & WOOD.

Where, in an action of *assumpsit*, in which the plaintiff relies on the common counts for *work done* and *materials found*, it appears on the trial that there is a *written contract* under which the work was agreed to be done, the plaintiff *must produce the contract or account* for its loss, or he cannot recover under the common counts.

A plaintiff, *on producing the written contract*, may recover under a general *indebitatus assumpsit*, if the agreement has been fully performed by him, and there was nothing special in the contract in relation to the *time or manner of payment*; or the credit, if any, has expired. So the plaintiff may recover on an *indebitatus assumpsit* for work done, though there was a *special contract* where the work was actually done, but not within the time or in the manner specified in the contract, if such work was done with the approbation of the defendant.

Where, however, the plaintiff is allowed to sustain his action in the latter case on a *quantum meruit*, the inquiry is not what *under other circumstances* he would be entitled to recover, but what is he entitled to in reference to the *contract price*, and the *damages* sustained by the defendant in consequence of the want of a *strict performance* on the part of the plaintiff.

THIS was an action of *assumpsit*, tried at the Rensselaer circuit, in September, 1838, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

The declaration contained the common counts in *assumpsit*, and the plaintiff claimed to recover payment for tanning 500 Georgia hides for the defendants, and proved that the work was worth 5½ or 5¾ cents per pound, and that the hides averaged 14 or 15 pounds each. It appeared, on the plaintiff's evidence, that the work was done under a *sealed contract*, between the parties, and on this ground the defendants moved for a nonsuit ; but the motion was refused, because it appeared "that the work, though not done within the stipulated time, had in fact been done, and there" [*61] was evidence of an acceptance of the leather by the defendants.

The defendants offered the written contract in evidence, and offered to prove its execution by *secondary evidence*, the subscribing witness being alleged to be *insane*. The judge holding, however, that there was not sufficient evidence of his insanity, refused to receive the secondary evidence, and the contract was not received. Proof was then given tending to show that the

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hides had been injured in the process of tanning. It also appeared that the leather was not returned under about eleven months. On these and other grounds, the defendants claimed a large amount of damages to be deducted from the claim of the plaintiff. The jury found a verdict for the plaintiff, for nearly the whole sum claimed by him.

B. R. Wood & M. T. Reynolds, for defendants.

S. Stevens, for plaintiff.

By the Court, BRONSON, J. When a man who has done work under a special contract, but not in conformity to it, either as to the time or manner of execution, is allowed to recover against a party who is not in fault, it is the duty of courts and juries to see that an ample allowance is made for all such damages as the defendant has sustained by the departure from the contract. The question is not what the work and materials cost the plaintiff, or how much, *under other circumstances*, he ought to have. He cannot, in any event be entitled to more than the contract price ; and from that must be deducted all that the defendant has lost by the want of a strict performance of the agreement. Any other rule would encourage a lax morality, and punish one man for the fault of another. On this ground, I think the defendants have reason to complain of the verdict. On the evi-

dence, as it appeared in the absence of the written agreement, the [*62] work was to have been done in five months ; and if we lay out of

view the alleged injury to the hides in the process of tanning, the jury have not allowed so much damages as the defendants must have sustained by the mere delay of six months in performing the contract. But beyond the question of time, I think the evidence nearly conclusive that the plaintiff was in the wrong in relation to the manner of performance. Some of the hides were not sufficiently tanned, and others were water pricked. It is not improbable from the evidence that some of the hides were damaged before the plaintiff took them ; but it is difficult to resist the conclusion that others were injured in the process of tanning. If the jury believed this, it was their duty to allow the defendants full compensation for their damages, although the consequence might be that the plaintiff would get nothing for his labor and materials. In short, the plaintiff should have been made to bear the consequences of his own fault. If the defendants on the whole derived no benefit from what had been done, they were not bound to pay any thing for it.

II. But I do not think it necessary to put the case on the ground that the verdict is against the weight of evidence ; nor to enquire whether the state of mind of the subscribing witness to the contract was such as to authorize the defendant to give secondary evidence of its execution. It was, I think,

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the business of the plaintiff to produce the written contract before he could be entitled to recover. I am not aware that this question has even been definitively settled. See *Linningdale v. Livingston*, 7 Johns. 36. *Clark v. Smith*, 14 Johns. 326. But upon principle it is extremely clear.

When the special contract has been rescinded or abandoned by the parties, or when an end has been put to it by the wrongful act of the party for whom the services were rendered, the other party may, in general, resort to the *indebitatus assumpsit* counts, and in that form recover for his labor and materials. In such cases, there is no subsisting special contract between the parties. There was one, but it is at an end.

But when there is a subsisting special contract between *the parties [*63] in relation to the thing done, all the cases agree, that the contract must control, and that the remedy is, in general, upon that, and not upon the common counts in assumpsit. 12 Johns. R. 274. 13 id. 94. 14 id. 326. 18 id. 69. *Id* 451. 16 *Wendell*, 632. The reason of the rule is obvious. The parties are bound by their agreement, and there is no ground for implying a promise, where there is express contract.

This rule, so far as it relates to the form of the remedy, is subject to two qualifications. If the agreement has been completely performed by the party who was to render the services, and there was nothing special in the contract in relation to the time or manner of payment, or the credit, if any, has expired, there is then a duty upon the other party to pay the stipulated price, for which a general *indebitatus assumpsit* will lie. *Bull. N. P.* 139. But this only goes to the form of the remedy. It does not supersede the necessity of producing the special contract. On the contrary, the agreement must be shown, for the purpose of seeing whether it has been performed by the plaintiff, and whether the stipulated time and mode of payment were such as to warrant a recovery without declaring specially on the contract.

The other exception to the general rule which has been mentioned, arises in cases where the plaintiff is entitled to recover, but he cannot sue on the special agreement, for the reason that he cannot aver and prove a full compliance with its terms. *Jewell v. Schroepel*, 4 *Cowen*, 564, will afford a sufficient illustration of a large class of cases on this subject. The plaintiff had completed the mill, and fulfilled the covenant in all respects, except in relation to the time of performance; and on that point it appeared that the plaintiffs, after the stipulated time had expired, proceeded to the completion of the work with the knowledge and approbation of the defendant. The plaintiffs could not sue on the covenant, because they could not show a strict performance: but the defendant having suffered the work to proceed, and it having ultimately been completed, the plaintiffs were allowed to recover on the common counts, in "assumpsit. In this, as well as in [*64] the other class of cases, the question only goes to the form of the

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remedy. The special contract is not overlooked and disregarded. On the contrary, it governs in every thing, with the single exception that the party rendering the services is not wholly precluded from recovering compensation for the want of a strict performance. It would, indeed, be a most extraordinary doctrine, that one of the parties to a special agreement could set it aside and render it nugatory by his own neglect or misconduct, without any fault of the other party.

Where one man has rendered services for another, upon request, or under circumstances from which a request may be inferred, and there is no proof of a special agreement, the law will imply a promise to pay what the services are reasonably worth. But the moment it appears that the work was done under a special contract, the implication is at an end. It is an axiom of law, that where the parties have come to an express contract, none can be implied until that is performed. *Lawes' Plead. Assump.* 8. In the case at bar, the plaintiff may have proved enough, in the first instance, to raise an implied promise to pay what the work was reasonably worth. But when it appeared that the work was done under an express contract, there was no longer any room for such an implied assumpsit. That ground of action was completely overthrown, and the plaintiff was driven to the necessity of making out a case under the special agreement. If he could do so, the form of the remedy might still be a *quantum meruit* count in assumpsit ; but the covenant was the foundation of the action, and the plaintiff was, of course, bound to produce it, or account for its absence.

Proof that the plaintiff had not performed in point of time, and that the leather had afterwards been accepted by the defendants, did not obviate the difficulty. Those facts only tended to show that the action might possibly be maintained—not that the plaintiff was entitled to recover as the case then stood. It was first necessary to compare his proofs with the terms of the covenant, to see wherein he had performed, and in what he was [*65] deficient. Beyond this, "the contract would, perhaps, show that the plaintiff had been paid in advance, or that the defendants were to pay in a particular manner, as by the delivery of specific articles, when demanded ; or that they were to have a credit, which had not expired at the time the action was brought. But if there was nothing special in the contract, either in relation to the time or mode of payment, the question was no longer how much the services were worth, but how much did the defendants agree to pay. In short, where there is an express contract between parties in relation to any matter, we must know what that contract is, before we can determine that either party is in the wrong, or what is the proper measure of damages ; and the burden of producing and proving the contract must of course rest on him who seeks to enforce it. True, the plain-

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tiff wishes to get away from the contract, and to recover just as though none had ever been made ; but that the law will not permit.

New trial granted.

THOMAS vs. LELAND and others.

An act of the legislature imposing a tax upon a *local* district of the state, in reference to a public improvement, such as a canal, is *valid* and *constitutional*, notwithstanding that previous to the passage of such act, a number of individuals of such district had entered into a *bond* to the state, by which they bound themselves to pay the whole expense of the improvement.

CONSTITUTIONALITY of a statute. The plaintiff declared against J. D. Leland, H. Shays, G. Langford and S. M. Mason, in *trespass* : the first count being in *trespass quare clausum fregit*, and taking and carrying away his goods, and the second in *trespass de bonis asportatis*. The three first named defendants justified, that they as commissioners for assessing and levying a tax on the city of Utica, in pursuance of an act of the legislature, passed 11th May, 1835, (*vid. Statutes of 1835, p. 35,*) assessed the sum of \$278, on certain real estate in the city of Utica, of [*66] which the plaintiff was owner ; that they appointed *S. M. Mason*, the fourth defendant, special collector to collect the tax so assessed, and that by virtue of a warrant issued by them, Mason entered upon the premises of the plaintiff and seized and took the goods, &c. to satisfy the tax. To this plea the plaintiff demurred. The defendant *Mason* separately put in a plea similar to the plea of the other defendants. To the plea of *Mason*, the plaintiff replied that the money authorized to be raised by the act of 1835, was secured to be paid to the state by the *bond* of several individuals, (naming them) who were *liable* to pay the same to the state, and that the money assessed upon his estate was not the *debt* of him, the plaintiff, nor was he liable to pay the same, and this, &c., wherefore, &c. The defendant demurred to the replication.

S. Stevens, for the plaintiff, insisted that the act of the legislature under which the defendants attempt to justify is a *void* act, and should be so declared by the court. The individuals named in the replication had voluntarily obligated themselves by bond, to pay into the treasury of the state a certain sum of money in consideration of the termination of a public work, (*the Chenango canal*,) being changed from *Whitesborough* to *Utica*. The statute authorizing this sum of money to be assessed upon the owners of real estate, in the city of *Utica*, was therefore taking the property of *some* set of

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individuals for the benefit of another set of individuals. The existence of such a power in the legislature has been uniformly denied in this country, and by the constitution the property of *an individual* cannot be taken even for *public use* without making compensation. *Hobbes*, the most ingenious of all advocates for the absolute powers of government, does not go further with his doctrine on this point, than to say that the property which a subject has in his goods, consists not in a right to exclude the *sovereign* from the use of them, but in the right to exclude *all other subjects*. *Vid. opinion of Senator Tracy, in Bloodgood v. Mohawk & H. R. R. Company*, in court for correction of errors, 18 Wendell 56. He also cited 2 *Kent's Comm.* 340.

[*67] **C. P. Kirkland*, for the defendant, insisted that all questions of *internal improvement* and of *general or local taxation* as applicable thereto, are exclusively within the power of the legislature ; and that consequently, whether a change in the termination of the Chenango canal should be made, and whether it should be regarded as a work of general benefit, to be paid for from the common fund, or as a work of local character, to be paid for by local taxation, were questions exclusively for legislative determination, with the decision of which no other department of the government can interfere. The various acts of the legislature on this subject are *in pari materia*, and when looked at together it will be seen that a *local taxation* was authorized for a *local benefit*. As to the power of the legislature in cases of this kind, and when their acts will be deemed void, he cited 1 *Black. Com.* 160, 1 *Kent's Comm.* 399, and 420, 8 *Wendell*, 101, 12 *id.* 328, 18 *id.* 30, *Nott & M'Cord's R.* 387, 4 *Wheaton*, 316, 9 *id.* 738, 8 *Coke*, 212, 234, *Hobart*, 87, 12 *Mod.* 687. He contended that the fact of a bond having been given by individuals to secure the payment of the increased expense, did not deprive the legislature of the power to impose a *local tax*, when they subsequently became satisfied that a local benefit had been conferred equally advantageous to the owners of property in a particular district or place.

By the Court, COWEN, J. It is objected by the counsel for the plaintiff, first, that the statute of 1835 sought to take the plaintiff's property without his consent, and appropriate it to the payment of a private debt due from others ; and that such a statute is unconstitutional and void. The consequence is not denied by the counsel for the defendants, who insists that the statute is, in effect, no more than any of our ordinary acts imposing local taxes for local improvements of a public character, such as highways and bridges. The object of the statute, and the share of individual or public concern in the tax, may be collected from the acts mentioned in the pleas, and more fully, when connected with the bond set forth in the replication to the second plea of the defendant Mason. Some time previous to March

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1834, "the canal commissioners, thinking that the Chenango canal [*68] then in progress of construction, might be more economically connected with the great western canal at *Whitesborough* than at the city of *Utica*, had fixed on the former place for its termination. Then came the act of March 24th, 1834, authorizing the commissioners, on the extraordinary expense of a termination at Utica being provided for by those more immediately interested, to change the termination to the latter place. Hereupon several individuals, either from public spirit, or in respect to their own profit, joined in a bond to the people, conditioned to pay into the treasury, for the benefit of the canal fund, \$38,615, the estimated excess, and so much more as should make good the contracts affected by the change. Thereupon the contemplated change was made. Afterwards, on the 11th May, 1835, the legislature deeming the debt thus contracted by individuals, unreasonably partial and onerous, passed the statute now in question, the object of which was to levy the tax on the owners of real estate in the city of Utica. The general purpose of raising the money by tax was, therefore, to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had been before given securing the same money, can detract from its validity. Should an individual volunteer to secure a sum of money in itself properly leviable by way of tax on a town or county, there would be nothing in the nature of such an arrangement, which would preclude the legislature from resorting by way of tax, to those who are primarily, and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?

But, secondly, it is said that, if the act had in view the construction of the canal, then it was unconstitutional, as seeking to take private property for public use, without just compensation, or any compensation.

To sustain this "argument it must be denied that the general profit [*69] of the community to which we belong will warrant a tax affecting our property. One answer in the case at bar is, that the improvement in question was, in itself, a compensation to the plaintiff. Such, at any rate, was the theory of the proceeding, and we must intend that it was carried out in practice. Such was the view taken by the legislature; and they must be left to judge of the compensation.

But the argument proves quite too much. It would go to cut off entirely many acknowledged powers of taxations; such as that which raises money to relieve the poor, or establish and keep on foot common schools, to build bridges, or work the highway. It confounds two distinct legislative powers; a simple power of taxation, with the power of taking private property for

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tax to build a lunatic asylum, may be mentioned as one instance. If the power to impose such a tax were to be rested on the ground of individual pecuniary benefit to each one who should be called on to contribute, it is quite obvious that it would not be maintained for a moment. Yet who would doubt that such might be imposed on a local community, a county or even a town? I admit that this power of taxation may be abused; but its exercise cannot be judicially restrained so long as it is referable to the taxing power. The only check lies at present in that power being usually exerted on considerable bodies of men, who possess a control in a greater or less degree over its agents.

Judgment for the defendants.

[*70]

**STANTON vs. THOMAS.*

Where a female is debauched in the house of a stranger, and he by writing under *seal* authorizes a party standing *in loco parentis* to sue *in his name* for the recovery of damages, and a suit is accordingly commenced and judgment recovered, after which the nominal plaintiff *acknowledges of record satisfaction* of the judgment, an action may be maintained by the party thus authorized to sue, against the nominal plaintiff for recovery of the amount of the judgment, and the suit may be brought *assumpsit*, notwithstanding that the writing giving authority to sue is under *seal*.

THIS was an action of *assumpsit*, tried at the Tioga circuit in September, 1838, before the Hon. ROBERT MONELL, one of the circuit judges.

Thomas executed an instrument in writing under his hand and *seal*, whereby, after reciting that one James Lownsbury had, as was alleged and believed, debauched and gotten with child Polly Ferry, the daughter of the wife of *Stanton*, whilst she resided at the house of *Thomas*; and also reciting that Polly had since returned home to the house of *Stanton*, where she was likely to occasion him expense and trouble, *Thomas* authorized *Stanton* to prosecute Lownsbury in such form of action as he should see fit, in the name of him, *Thomas*, or otherwise, as might be deemed advisable: *Stanton* keeping *Thomas* harmless from all damages, costs and charges by means of such suit or suits. By virtue of this instrument, a suit was commenced and prosecuted by *Stanton*, in the name of *Thomas* against Lownsbury, for the seduction of Polly Ferry, and a judgment recovered for \$300 damages; and after the recovery, *Thomas* *acknowledged of record satisfaction of the damages* so recovered. The plaintiff thereupon commenced an action of *assumpsit* against the defendant to recover of him the money thus acknowledged by him to have been received. The declaration contained several special counts, and also the *money counts*. The defendant pleaded the general

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public use. The former acts upon communities and may be exerted in favor of any object which the legislature shall deem for the public benefit. A issue. On the trial of the cause, the above facts appeared, and the judge nonsuited the plaintiff on the following grounds : 1. That the cause of action against Lownsbury being in *tort*, was not the subject of assignment ; 2. That the instrument *executed by the defendant did not [*71] amount to an assignment ; and 3. That it was void for champerty. The plaintiff moves for a new trial.

M. T. Reynolds, for the plaintiff.

S. Stevens, for the defendant.

By the Court, NELSON, Ch. J. The only doubt I have entertained in the consideration of this case is, whether the suit should not have been founded upon the implied covenant growing out of the power of attorney. I agree to the opinion expressed by my brother Cowen, when this instrument was before him heretofore, 19 *Wendell*, 73, that upon fair construction it is a power coupled with an interest, and carries by implication the beneficial right of the cause of action, and was so intended by the parties. The reasons assigned for this view in the opinion referred to are full and entirely satisfactory. But after the fullest examination and reflection I have been able to bestow upon it, I have come to the conclusion that *assumpsit* will lie, and perhaps that action only.

It is a familiar law, at this day, that the rights of the assignee of a chose in action will be recognized in a court of law, and protected ; he stands in the place of the assignor for all purposes except the form of the remedy ; and if money be paid the latter, it is received to the use of the former, for which an action for money had and received will lie ; and ordinarily, if the money is paid after notice, it will be in fraud of the assignee, and ineffectual to discharge the debtor. There are interests, however, so exclusively personal and contingent, as to be incapable of transfer by any mode of assurance, and this was deemed to fall within that class of cases in the decision already referred to, and therefore not protected by notice. But though the assignment in these cases is held to be ineffectual to transfer any interest in the subject matter, the object of the parties, if lawful, will be attained in another way ; it will operate as a covenant or contract between them, and the duty enforced by *reason of that obligation. This [*72] principle has been repeatedly asserted and acted upon, 19 *Wendell*, 73 ; most of the authorities are referred to there, and I need not go over them. *See also Viner, tit. Assign. B. and tit. Covenant, C. pl. 20. 2 Black. R. 820.*

I have said the serious doubt in the case is, whether the action should not

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have been founded upon the implied covenant, inasmuch as the instrument is under seal out of which the rights of the plaintiff have accrued. Such was the remedy in the cases above cited—the word *assign* being construed to imply a covenant to perform the thing contracted for, or respond in damages. If that term had been used in this instrument, I should perhaps have felt bound by the authorities ; that remedy being complete, and of a higher nature, might have presented a serious objection to the action of *assumpsit*. I am not, however, prepared to admit that even then, where the demand is for money withheld, that *assumpsit* might not lie. But it is not important to pursue the distinction. Here the term is not to be found, nor any other, from which covenant can be implied upon any authority that has come under my notice.

Is the plaintiff then without remedy ? I think not. The money belongs to the assignee in equity and conscience, and is wrongfully withheld. The action of covenant given in the cases referred to proves this. The omission of technical phraseology does not affect the nature of the contract : any language evincing the object and intent of the parties is all that is essential. The right to the money is still as perfect as if covenant could have been sustained had the instrument been without seal. No question on this point could have been raised. *Assumpsit* would have been the only appropriate remedy. The case, I think, should now be regarded in that light. The omission of technical language affects the remedy, not the right to the money. It belongs to the plaintiff ; has been received in fraud of his rights, and is held against duty and conscience. The proposition is a general one, that where the defendant receives money belonging to the plaintiff, or where in equity and conscience he should not withhold it from him, as [*73] *assumpsit* will "lie as for money had and received to the plaintiff's use ; the law implies a contract in favor of the party entitled to it.

2 Saund. Pl. and Ev. 670, and cases.

The principle contained in *Burnett v. Lynch*, 5 Barn. & Cress. 589, is somewhat applicable here. There a lessee assigned by deed poll to the defendant his lease, subject to the payment of rent, and performance of covenants. He had been sued by the lessor for neglect of repairs while the assignee was in possession and mulcted in damages. This action was brought for that neglect of duty and to indemnify himself against that recovery. The action was *case*, but all the judges held that *assumpsit* would have been appropriate. Covenant would not lie because the assignee had not signed. They grounded the right of action upon the duty of the defendant to make the necessary repairs, arising from the implied contract in the assignment, for the breach of which duty the plaintiff had been damnified : taking the assignment subject to the covenants in the lease, implied a duty on his part to perform them. The duty is equally clear in this case to pay

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over the fruits of the recovery to the plaintiff. Such is the effect of the contract, and which is lawful and binding within the cases and principles already referred to. I am of opinion, therefore, the action may be sustained upon the common counts for money had and received.

I have not deemed it important to consider the point of maintenance and champerty which was urged, because the authorities upon which the right to recover is believed to be sustained shew that the assignment is lawful, and operative by way of contract, though not as passing any interest in the technical sense of the term. The right rests wholly in contract.

New trial granted, costs to abide event.

*THE SARATOGA & SCHENECTADY RAIL ROAD COMPANY *vs.* Row [*74]
and TREDWAY.

Where a contract is made for work to be done at a stipulated price, and it is discovered before the work is commenced, that a *misrepresentation* has been made in respect to its value, the party engaging to do the work may repudiate the contract ; if he does not do so, but goes on and performs it, he can demand no more than the contract price.

THIS was an action of *replevin* for a quantity of coke, tried at the Schenectady circuit, in March, 1838, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

The plaintiffs, by their agent *John Costigan*, purchased 50 chaldrons of coke in the city of New-York, and at that place made a written contract on the 30th June, 1836, by which *Teall & Co.* agreed to transport and deliver the coke at the rate of \$1,50 per chaldron, which price was to include the expense of transferring the coke from the cellar of the store, 125 Washington-street, N. Y. to the boat, and unlading the same at Schenectady. A boat load of the coke, amounting to about 35 to 40 chaldrons, arrived at Schenectady on the twelfth day after the date of the contract. The defendant, *Row*, was the captain of the boat, and refused to deliver the coke to the plaintiffs, except upon the payment of charges amounting to a considerable sum beyond the contract price. The plaintiffs offered to pay, at the contract price, and demanded the property. *Row* stored the coke with the defendant, *Tredway*, after he had been fully informed of the contract, and of the tender and demand. The plaintiffs thereupon replevied the property.

The defence set up by *Teall & Co.* for the defendants, was, that the cellar of 125 Washington street was further from the water than *Costigan* had represented at the time the contract was made, in consequence of which the whole of the coke was not shipped—the boat being obliged to leave before

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all could be got on board. *Buel*, who was the clerk of *Teall & Co.* [*75] and made the contract on their behalf, was "the witness to make out this part of the case. He said he was on the other side of the city, half a mile from the coke, when the contract was made—that *Costigan* asked him to go and see where the coke was—how near the water, before he contracted, but he did not go. *Costigan* denied all misrepresentation.

The defendants insisted that *Costigan* had misrepresented the true location of the coke, and that this had prevented a full performance of the contract on the part of *Teall & Co.* The judge left the matter to the jury as a question of fraud, and they found a verdict for the defendants. The plaintiffs now move for a new trial.

A. C. Paige, for plaintiffs.

M. T. Reynolds, for defendants.

By the Court, BRONSON, J. How the jury could have found upon the evidence that there was any fraud on the part of the agents of the plaintiffs, I am at a loss to discover. But it is unnecessary to consider whether the verdict is against the weight of evidence, for I am of opinion that the case was not properly submitted to the jury.

The defendants refused to deliver the coke on being paid the contract price for transportation, on the ground that the cellar in which the coke lay in New-York, was a few feet further from the water than the clerk of *Teall & Co.* thought it was at the time the contract was made. Not only the street and the number were mentioned in the contract, but the clerk was invited to go and look for himself before the bargain was concluded. But waiving this consideration, and assuming that he was intentionally misled by the representations of *Costigan*, though there is no evidence of that fact, yet, after the bargain was concluded, and after *Teall & Co.* saw where the coke lay, they elected to go on with the contract; and having done so, they are bound by it in relation to the rate of compensation. See *Lloyd v. Brewster*, 4 *Paige*, 537. If the alleged misrepresentation had related to some other matter, and the truth had not been discovered until after the [*76] performance of the contract had been "commenced, a different question would have been presented. But when a party has discovered what he deems a fraud before he has entered upon the performance, he must then decide whether he will stop short, or go on with the contract. He cannot say this is a good contract for the purpose of authorizing me to do the work, but it does not bind me in relation to the rate of compensation. By going on, *Teall & Co.* affirmed the contract, and they and their agents are bound by it. No case was mentioned, and none, I think, can be found, which sanctions a different doctrine. If *Teall & Co.* acted under the con-

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tract, that must then govern throughout ; if they rejected the contract, they then had the plaintiffs' goods without authority, and were entitled to no compensation for their voluntary services.

It is unnecessary to notice the other objections.

New trial granted.

ZULE vs. ZULE.

Where a *lessor* puts an end to a *term* intermediate the days specified in the lease for the payment of rent, he is not entitled to claim an *apportionment of rent* and recover the portion accrued since the last rent-day, unless there be a provision in the lease allowing a demand *pro rata*.

Where a lessor by deed demises a farm with the farming utensils and stock upon it for a specified term, reserving a right to *sell* the farm before the expiration of the term, and he exercises the right, it is questionable whether he can demand a return of the utensils and stock previous to the expiration of the term mentioned in the lease ; but if he may demand such return, he cannot bring an action upon an *implied covenant* to do so, but must resort to the action of *trover* or *replevin*.

APPORTIONMENT of rent. The plaintiff declared in *covenant* for that on the 1st February, 1838, an indenture of lease was executed by him and the defendant, whereby he *demised* to the defendant a certain farm together with the use of all the farming utensils and stock, (as aforesaid appraised by the appraisers in 1832) for the term of *five years*, from 1st April, 1838, subject to an annual rent of \$100, to be paid semi-annually. It was further alleged "in the declaration that the plaintiff *reserved* [*77] *the right to sell* the whole or any part of the described premises at any time previous to the expiration of the lease on certain conditions ; that the defendant entered and remained in possession *up to the time of the sale* of the premises by the plaintiff, in the month of June or July, 1839 ; that \$100 rent became due on the 1st April, 1839, and *still remains due* ; and also that on 7th July, 1839, there was due on the lease the rent which accrued from 1st April, 1839, up to that time, *according to the proportion* that the time aforesaid bore to one year, being about *twenty-seven dollars*, which also remained unpaid. It was then averred, that by reason of the sale of the farm on the 7th July, the lease terminated on that day, and that the defendant became liable to pay *the value of the farming utensils and stock*, appraised at \$160, in consequence of his *refusal* to return the same upon *demand*. The breach alleged is the non-payment of the rent, and the omission to return the farming utensils and stock. There is no allegation in the declaration that the defendant *covenanted* to return the farming utensils and stock. The cause was heard by *referees*, who made a report in favor of the

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plaintiff. The declaration was entitled generally of July term, 1839, and demanded rent up to the *seventh* day of July, which was subsequent to the *first* day of the July term. It however appeared by an *affidavit* annexed to the papers presented to the court by the defendant's attorney, that the suit was in fact commenced in *August*, 1839. The defendant moved in arrest of judgment.

D. Cady, for the defendants.

M. T. Reynolds, for the plaintiff.

By the Court, COWEN, J. The suit appears by the memorandum, to have been commenced in July term, 1839, and the declaration claims rent to the *seventh* day of that month. The memorandum being general of that term relates to the first day, which preceded the seventh. This would [*78] be a "fatal objection in arrest on a general report, were it not for its appearing from Mr. Frothingham's affidavit that the suit was in truth commenced late as August, 1839. We might be warranted, therefore, in allowing the memorandum to be amended, and made special, so as to state the true time. That, we ought to allow according to *Thomas v. Leonard*, 11 Wendell, 53; and *Soper v. Soper*, 5 *id.* 112. *Tebbetts v. Dowd*, 23 *id.* 379.

But can the rent be apportioned? There is no covenant providing for apportionment; and the current half year's rent did not fall due, by the terms of the lease, till the 1st of October. Intermediate the beginning of the year and that time, the plaintiff put an end to the term. Suppose the provision had been that he might enter when he pleased; could he have selected his own time and thus worked an apportionment of the rent? Even where the tenancy was determined by the act of God, as where the lessor was tenant for life and died intermediate the rent days, the rent could not be apportioned. Hence the statutes, 11 *Geo. 2*, ch. 19: and 1 *R. S.* of 1813, 443, § 27; and 1 *R. S.* 788, 2d. ed. § 22. *Vide Viner's Abr. Rent* (*H. a*), pl. 1, 2, 3; 2 *Eq. Case. Abr.* 704, 5. *Rent* (*A*). The objection is stronger against the lessor, where he puts an end to the lease by his own act without necessity. It is enough to say however, that there is no special provision either in the lease or by statute, and without one or the other, rent can never be apportioned in respect to time. *Viner's Abr. Rent*, (*H. a*), pl. 1, 2. *Co. Litt.* 155, a. *Wentworth v. Abraham*, *Hetl.* 53; *Litt. R.* 61, *S. C.*, is in point. There the declaration was on a promise to pay 30*s.* rent yearly so long as the tenant should enjoy. The declaration shewed an enjoyment for one year and an half; and claimed 45*s.*; for which the plaintiff had a verdict. But the judgment was arrested. Richardson, J. said the promise is not *secundum ratum*; for then he might divide the rent. He added, if a lease be made for two years or at will, paying annually at Michaelmas 30*s.*,

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and the lease is determined after half of the year, although by the lessee himself, no rent is due. It is the same of all debts. Thus where the defendant's testator retained the plaintiff in service for one year at [*79] a salary of £100, but died at the end of three quarters of a year; the plaintiff declaring and having recovered for £75, the judgment was reversed. *Countess of Plymouth v. Throgmorton*, 1 *Salk.* 65. All the books I have cited repeat and adopt the maxim *annua nec debitum iudex non separat*. To this there are many cases; but it is enough to refer to *Clun's case* 10 *Rep.* 127, where the question is treated by *Coke*, and is of course exhausted. It is not necessary to deny that, under the modern notions of the rescission of contracts, and implied assumpsit for use and occupation, work &c. actions might now be brought in the cases cited; nor that they might when *Coke*, *Hetley* and *Littleton* were engaged in reporting. But an implied assumpsit is general, and supposes the special contract out of the way under circumstances which raise an equitable demand. If you declare specially, as you generally must in covenant or debt on a specialty, the claim is still indivisible as to time. The general maxim is well illustrated by two more cases which I will mention, though they do not respect time. A man covenanted to allow his clerk so much for every quire of paper which he should copy out. The breach assigned was, that he copied out a bill which extended over five quires and a half, claiming for the whole and alleging that the defendant had not paid. The plaintiff recovering a verdict for the whole, judgment was arrested because there was no mention in the contract of allowing for the half. *Needler v. Guest*, *Sty.* 12; *Viner's Abr. Apportionment*, (A), *pl.* 23, *S. C. differently stated, but S. P. resolved*. At *pl.* 26, of the same letter, Mr. Viner mentions a promise to pay £2 a ton for iron; and a declaration for one ton and a half, with a verdict for the plaintiff. This he says is cited in *Sid.* 225, *pl.* 19, as adjudged to be ill; but he adds in the margin that the same case is reported in *Yelv.* 184, *Bettisworth v. Campion*. But there the agreement was laid to pay *secundum ratum* of 40*s.* per ton, and therefore the declaration being so, it was adjudged for the plaintiff that the defendant ought to pay for odd pounds, &c. over and above the ton. No one would doubt at this day that on a general indebitatus assumpcit for all the work or all the iron mentioned in the two last cases, the plaintiff might recover, though no *pro rata* were mentioned; but that would be on the new and implied contract resulting from the performance on one side and acceptance on the other. Mr. Viner complains that he suffered injustice at the hands of a jury under this loose modern notion, in an action against him by a servant, who contracted for a year, but left him before the time ran out. Sir John Strange argued against him *at nisi prius*, and called upon him to publish the case in his abridgement, which was then in the press. He wrote to Sir John for a report of the

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fact of the case, but failed to obtain it, he thought, because the advocate, on searching, became diffident of being able to support it on authority. See the letter and history of this matter, *Viner's Abr. Apportionment*, (A), pl. 28. Of course that case is not law, because the servant was in fault; otherwise had the fault been with Mr. Viner. And yet even in such case the servant could not have recovered a portion on the special contract. He must have waited his time, and gone for his damages on the whole covenant, alleging a tender and offer to perform. In such case the damages might have been apportioned in amount for the idle time. In the case at bar, there is no fault alleged as lying on the side of the defendant, nor could there be any. The nature of the act which put an end to the term during the current half year shews that it lay with the plaintiff himself; and there being no *pro rata* clause, the ancient cases apply in all the force of authority, and with more reason than can be found for some of them. The rule was held to be the same both at law and in equity, on a bill to apportion rent, in *Jenner v. Morgan*, 1 P. Wms. 392; though there was a case to the contrary, *Meely and Webber*, a note of which is given in 2 Eq. Cas. Abr. 704, *Rent*, (A), thus: A parson leased his tithes at a rent payable yearly, and died within the year, by which his estate was gone; and the court of exchequer, acting on the equity side, apportioned the rent. Another like case in the exchequer is there mentioned looking strongly the same way. But these very cases conceded the "rule at law to be otherwise; going into equity for that [*81] sole reason. The statute of Geo. II, before cited, gives an action for apportionment, under such and the like circumstances.

But however it may be as to the rent, the plaintiff has also assigned what he calls a breach of covenant in the same count, *for not restoring the personal property*. Now it is quite questionable, to say the least, whether the sale of the land put an end to the term in the utensils and stock. But independently of that difficulty, which seems to be insurmountable, the declaration sets out no covenant, nor will the law imply one from the lease which is recited. The remedy of the bailor, (for the lessor is no more than a bailor,) is to demand the restoration; and if that be refused, bring trover, detinue, or replevin under the late statute, as he would bring ejectment where the tenant holds over after a demise of land has expired. The act of holding over is, in either case, a wrong, and can be redressed by an action *ex delicto* only. It is not necessary to say, whether, on a bailment by simple contract, for a certain time, the law may not imply a promise to re-deliver after the term ended. The bailment in question is by specialty; in respect to which Buller lays down the rule thus: "If a man make a lease of goods by indenture, which are evicted within the term, yet the lessee shall not have covenant; for the law does not create any covenant upon such personal things, vide 1 Roll. Abr. 519, *Covenant (F.) S. P.*; and therefore in the case of

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a lease of a house with goods, it is usual to make a schedule of them, and have a covenant from the lessee to re-deliver them at the end of the term; for otherwise, the lessor can only have trover or detinue." *Bull. N. P.* 157, *Lond. ed.* 1788. *Bedford v. Hall*, *Ow. 104*, 36 *Eliz.*, seems contra, and is so put by Roll, *ut supra nom. Bedford and Bull*, 87 *Eliz.* But I quote a fifth edition by Buller himself; and his distinction is taken in several of the more modern books which treat of covenant; I presume in all. *Platt on Covenants*, 49. *Bac. Abr. Covenant (B.)* The concurrence of Roll and Buller, however, is sufficient to overcome the loose and obscure report of Owen. Thus, "the plaintiff will be seen to claim [*82] by his declaration two several things beyond what his contract can possibly carry: first, a portion of rent unapportionable; and secondly, damages for breach of a supposed covenant which has no existence. On both of these the report gives him something; for the averments claiming them are substantial and material. It would be otherwise, I think, if they were merely formal, as in *Arnold v. Arnold*, 3 *Bing. New Cas.* 81, and *Tebbetts v. Dowd*, before cited.

The judgment must, therefore, be arrested.

WHITNEY & SCHUYLER vs. GROOT.

A *guaranty* addressed to a mercantile firm in these words: "We consider Mr. J. V. E. good for all he may want of you, and we will indemnify the same," is a valid instrument binding upon the guarantors, who are not entitled to notice of the acceptance of the guaranty of the sale and delivery of goods under it to the principal.

Such a guaranty, however, is not a *continuing guaranty*; the party making it is liable for the amount only of such goods as were obtained on its first presentation, and not for those subsequently obtained, and the first payments made by the principal must be applied towards satisfaction of the charge for which the surety is responsible.

THIS was an action of *assumpsit* on a *guaranty*, dated 8th November, 1836, in these words: "Messrs. Whitney & Schuyler, Gentlemen: We consider Mr. James L. Van Eps good for all he may want of you, (and we will sell him all he reasonably ask of us on credit,) and we will indemnify the same." Signed, "Sanders & Groot." The defendant was a member of the firm of *Sanders & Groot*, the plaintiffs were wholesale grocery dealers in the city of Albany, and Van Eps was a grocer in the city Schenectady. On the day of the date of the guaranty, Van Eps purchased goods of the plaintiffs, upon the strength of the guaranty to the amount of \$197,12; a few days thereafter he made another purchase to the amount of \$28,59,

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in January to the amount of about \$124, and in March and April two further purchases were made amounting in the whole to \$338,19 ; all [*83] *the sales being at a credit of four months. In January, 1837, Van Eps paid the plaintiffs \$50, and a like sum in March. In August, 1837, the plaintiffs commenced a suit against Van Eps, recovered a judgment for the goods sold to him, and issued an execution which was returned *nulla bona*. The plaintiffs then commenced this suit, and in the *first count* of their declaration alleged that in consideration that they would sell and deliver to Van Eps on credit, all such goods as he should want and have occasion for and require of them in their business as merchant grocers, the defendant undertook and promised the plaintiffs to indemnify them for whatever goods they should sell and deliver to Van Eps. They then aver that they accordingly sold and delivered goods to Van Eps to a large value, to wit, &c. on credit, and that though the time of payment had elapsed, he had neglected to pay them, of which the defendant had notice ; and conclude by alleging that the defendant had not indemnified them, and that the debt contracted by Van Eps remains due and unpaid. There were three other special counts, and also the common money counts. The defendant pleaded the general issue. The cause was heard by a *referee*, and on the above facts being shown, the plaintiffs rested. The counsel for the defendants thereupon insisted : 1. That the instrument produced was not a valid guaranty within either of the counts of the declaration ; 2. That the plaintiffs were not entitled to recover, because notice of the acceptance of the guaranty and of the sale of the goods had not been given to the defendant ; 3. That the instrument signed by the defendant, if a guaranty, was not a *continuing guaranty* ; that the defendant, if responsible under it, was responsible only for the first parcel of goods purchased by Van Eps, and the payments made by him to the plaintiffs should be applied towards payment of that parcel. The referee reported in favor of the plaintiffs for the sum of \$321,79. The defendant moved to set aside the report.

M. T. Reynolds, for the defendant.

S. Stevens, for the plaintiffs.

[*84] *By the Court, NELSON, Ch. J. 1. The instrument is certainly imperfect and obscure ; and it is surprising business men should have parted with their goods upon the strength of it, before explanation. I am inclined, however, to think we are bound to understand the effect of it to be as an indemnity to the plaintiffs for the goods they should deliver to Van Eps. The intervening terms as to credit to be extended by Sanders & Groot ought to be read as included in a parenthesis ; upon any other

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view the instrument is unmeaning. It was therefore admissible under the first count, and perhaps under others.

2. The instrument did not contemplate any notice of acceptance, or of the sales to the defendant made in pursuance of it ; it was not a proposition to become surety for Van Eps, but an absolute undertaking to pay for the goods if he did not, and obviously contemplated a sale and delivery on presentation. Unless there is something in the nature of the contract or terms of the writing creating or implying the necessity of acceptance or notice as a condition of liability, neither are deemed requisite. 2 *Hall's R.* 197, 12 *Mass. R.* 156, and such is believed to be the rule of the English courts. The party entering into an absolute engagement for the responsibility of his friend should see to the performance of it ; the relation in which the parties afterwards stand to each other presupposes privity and knowledge of the credit obtained.

3. It is, in most of these cases, a nice and difficult question to determine, whether the guaranty is a continuing one or not. The intent of the party to be derived from the words is the only sure guide ; and therefore very little aid is to be derived from the adjudged cases, as they turn upon the peculiar phraseology of the guaranty. Upon general principles a strict interpretation should be applied in favor of a surety. I cannot say the credit was to be extended beyond the first parcel of goods. "All he [Van Eps] may want of you," does not necessarily extend beyond this—it may fairly intend all he may want at the time. Ordinarily the instruments that have been held to be continuing guaranties limited the *amount* of the credit which greatly diminished the "responsibility. In the case of *Rogers v. Warner*, 8 *Johns. R.* 119, the words, I think, were broader than in the writing before us ; yet it was held that the defendant was not liable for an indefinite time, but only to an indefinite amount for one time. So here.

The report, therefore, should have been for \$109,09, instead of \$321, 79 ; and must be modified accordingly.

PETRIS and another *vs.* T. C. & J. SHOEMAKER.

Ejectment cannot be brought by a committee of the person and estate of an individual in respect to whom a writ in the nature of a writ *de lunatico inquirendo* had been issued, and an inquisition found that he was then incapable, &c.

The effect of a *deed* of land executed by such individual alluded to.

THIS was an action of *ejectment*, tried at the Herkimer circuit in November, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

New-York, May, 1840.—*Petrie v. Shoemaker.*

On a commission out of chancery, it was found by inquisition in June, 1838, that *Augustinus Osterhout* was then, and had from his nativity been of unsound and imbecile mind, deprived of reason and understanding, and laboring under weakness of intellect, so as wholly to incapacitate him to conduct his own affairs, and to govern and manage his own business and property. The plaintiffs were thereupon appointed *a committee of his own person and estate*, and brought this action to recover forty acres of land which the father of *Augustinus* had conveyed to him many years before.

The defendants gave in evidence a deed of the premises in question from *Augustinus* to *Frederick Osterhout*, dated July 2, 1817, which had been acknowledged and recorded about one year after its date ; and then showed a regular deduction of title from the grantee to themselves ; they also proved that possession had been held under the deed to *Frederick Osterhout* from its date down to the time of the trial. Evidence was given by [*86] both parties in relation to "the capacity of *Augustinus* to transact business ; and the plaintiffs gave evidence tending to show that he was imposed upon in relation to the payment of the consideration money at the time the deed was given. The judge refused to non-suit the plaintiffs on the ground of twenty years adverse possession, and under his charge the jury found a verdict for the plaintiffs. The defendants now move for a new trial on a case.

M. T. Reynolds, for defendants.

J. A. Spencer, for plaintiffs.

By the Court, BRONSON, J. *Augustinus Osterhout* is neither an idiot nor a lunatic in the legal sense of those terms, though a man of great imbecility of mind. Whether his deed to *Frederick Osterhout* is void or not, may be a very doubtful question. *See Matter of Barker*, 2 Johns. Ch. R. 282 ; *Jackson v. King*, 4 Cowen, 207 ; *Odell v. Buck*, 21 Wendell, 142. But it is unnecessary to inquire whether the deed is of any force or not.

The action is wholly misconceived. It should have been brought in the name of the *non compos*. The committee have no estate in his lands. They are regarded as mere bailiffs acting under the direction of the court of chancery, which has the care and custody of idiots and lunatics, and of their real and personal estate. *Shelford on Lunacy*, 179, 180, 339. 1 *Collinson on Lunacy*, 270, ch. 28. 2 R. S. 52, tit. 2. 1 id. 634, tit. 3. It is of course unnecessary to notice the question of adverse possession.

New trial granted.

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***THURMAN vs. CAMERON.**

[*87]

A *deed* obtained by the grantee of lands in the *actual possession of another*, held adversely to the title of the grantor, is void, although the title under which the party in possession holds is bad.

A *certificate* made by statute evidence of certain facts, requires no proof of its genuineness, where on its face it appears to be regular. Thus, the certificate of the acknowledgment of a deed is received without proof of the *official character* of the officer granting it, of his *signature*, or that it was granted *within the jurisdiction* where he is authorized to act. The evidence, however, is only *prima facie*, and may be rebutted.

It is not necessary that a certificate of acknowledgment should be *endorsed* on the deed; it is enough if it be on any part of it.

Nor is it necessary that the officer should certify that he knew the person making the acknowledgment to be the grantor *described* in the deed, if he state that he knew him to be the person who *executed* it.

Where, on the trial of an *ejectment*, a verdict is entered for the plaintiff, with leave to the defendant to move to set it aside, on the motion for a new trial the defendant is not allowed to object that the plaintiff *failed to show title in himself*, if such objection was not raised at the trial.

THIS was an action of *ejectment*, tried at the Warren circuit, in June, 1835, before the Hon. ESEK COWEN, then one of the circuit judges.

The plaintiff claimed to recover lot No. 5, in the subdivision of lot No. 54, of a tract of land called *Hyde patent*. The declaration contained but one count in the name of the plaintiff. He produced a deed from George Hooker and Richard A. Ives, of the state of Connecticut, to Charles G. Ives, bearing date 26th September, 1827, conveying the premises in question. At the foot of the conveyance and *not endorsed* on the back thereof, was a certificate of acknowledgment of its execution by the grantors, purporting to have been granted by "David Daggett, a judge of the superior court of the state of Connecticut." It commenced thus: "State of Connecticut, ss. Hartford, September 26th, 1827," and then proceeded to state that on that day George Hooker and Richard A. Ives, well known to him to be the persons who executed the foregoing instrument, appeared before him and acknowledged the same to be their act and deed.

The counsel for the defendant objected to the deed "being received in evidence, on the grounds: 1. That the certificate was not *endorsed* on the deed; 2. Because there was no evidence of the *official character* or of the *signature* of the officer whose name purported to be subscribed to it, or that the acknowledgments were taken *within the jurisdiction* of the superior court of Connecticut; and 3. That the certificate was defective in not stating that the officer knew or had satisfactory evidence that the individuals making the acknowledgment were the persons *described in the conveyance*. The judge ruled that the certificate was *per se* evidence of the *official character* and *signature* of the officer, and received the deed [*88]

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in evidence. The plaintiff then produced in evidence a deed from Charles G. Ives to Asahel Hooker, dated 28th March, 1828, a deed from Asahel Hooker to Gaylord Wells, dated 29th March, 1828, and a deed from Gaylord Wells to *John Thurman*, the plaintiff in this cause, bearing date 20th August, 1834—all of the premises in question. The last deed contained a clause in these words : *It being understood that the said party of the second part is to answer or pay all claims or charges which may hereafter be incurred in obtaining possession of the premises.* There were objections to the validity of the *certificates* of acknowledgment on some of the latter deeds similar to those taken in respect to the certificate on the deed first offered. The plaintiff proved that in 1826, the defendant was in possession of a *part* of the premises in question, and at the time of the trial was, and for some before had been, in possession of the whole lot, claiming to have got his title from Judge Baldwin, as *somebody's agent*. The plaintiff also produced in evidence a paper bearing date 25th October, 1826, subscribed by *Seth C. Baldwin, jr. agent for Hooker & Ives*, and by B. V. Benthuysen, agent for John Williams, requesting a surveyor to make a division of lot No. 5, between their principals, assigning to *Hooker & Ives* 310 acres, and to Williams 190 acres.

The defendant proved that he was in possession of portions of the premises under *quit claim deeds* since the year 1820, obtained by him [*89] from persons previously in possession, and that on the 14th July, 1828, he obtained a deed from *Seth C. Baldwin, junior*, conveying *in fee* the premises in question ; in which deed, after describing the premises conveyed, there is a clause that the grantor conveys as well his own interest and right, as the *interest and right of George Hooker and Richard A. Ives, for whom the grantor is (as he alleges) the duly appointed agent and attorney.* Hooker and Ives are not, however, described in the deed as the grantors, and the deed is executed thus : *Seth C. Baldwin, L. S.* It was proved by the surveyor, that in 1826, the defendant was in possession of part of lot No. 5 ; that he had at that time about 50 acres under cultivation, a house and out buildings ; that he resided on the premises, and has ever since continued to reside there ; that on the 20th August, 1834, he was in possession of the premises, exercising acts of ownership over the same. The surveyor further testified, that soon after the plaintiff's return from Connecticut, in August, 1834, the plaintiff informed him that he had bought the whole of the Cameron farm ; that he had seen Cameron's title on the records, that Baldwin was only an agent, and had given the deed *in his own name*, that the deed was not good for any thing, and he the plaintiff had as good right to buy as any one. The judge intimated his opinion that the plaintiff could not recover, because at the time of obtaining his deed the defendant was in the actual possession of the premises, claiming under a title

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adverse to that of the plaintiff's grantor, but concluded to permit the plaintiff to take a verdict, *with leave* to the defendant to move to set it aside. A verdict for the plaintiff was accordingly entered, which the defendant now moves to set aside. On the argument of the cause, the defendant by consent of the plaintiff, produced in court a *power of attorney* from *George Hooker and Richard A. Ives* to *Seth C. Baldwin*, executed on the 4th July, 1825, authorizing him *in his own name*, or in their names, to *sell* the premises in question, and engaging to *ratify* and *confirm* whatsoever he should lawfully do in the premises.

**W. Hay*, for the defendant.

[*90]

S. Stevens, for the plaintiff.

By the Court, COWEN, J. There being no count in the declaration except on the plaintiff's title, he was bound to show a valid deed to himself. He claimed under Gaylord Wells, by deed dated in August, 1834, who claimed under George Hooker and Richard A. Ives by sundry mesne conveyances. They had in 1825 authorized Mr. Baldwin to convey, but had revoked that power in 1827, by themselves then giving a deed to Charles G. Ives, from whom the paper title came to the plaintiff, if he had any. Yet Mr. Baldwin conveyed to the defendant in 1828. This deed was unavailable, as passing any title, for two reasons: 1. Hooker & Ives, as we have seen, had before conveyed; and 2. If they had not, the deed was null, as being or purporting to be in Mr. Baldwin's own name and right. This latter was so, notwithstanding the letter of attorney to him declared that he might convey in his *own name*, or in the name of his principals. The parties could not thus change the established forms of conveyancing. The attorney is bound to use the name of his principal both in the body of the deed, and by way of signature, and for and in the name of his principal to affix the proper seal. If he make the deed in his own name, it is his own personal contract, and cannot operate as against his principal for any purpose. *Storey on Agency*, 137 *et seq.*, ed. of 1839.

The defendant then, I think, must be taken in every sense as having a possession, and claiming under the independent deed of Mr. Baldwin so early as 1828. That possession was actually adverse as to part, and constructively for the residue. The defendant had for several years cultivated the premises in question as owner, making considerable improvements. All this was public, notorious, and well known to the plaintiff in 1834, when he took his deed from Wells; and that deed was taken with the express view to this litigation. It was therefore clearly void, as being both against the letter and spirit of the law to prevent maintenance, *un-

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less the adverse character of the possession was destroyed or qualified by the defendant's declaration that Mr. Baldwin, when he conveyed, or contracted to convey, acted as the agent of Hooker & Ives. This, it is supposed, operated as a recognition of their title; and that the defendant, in effect, must be taken as claiming under them at sufferance, because the conveyance from their attorney, which he believed to be valid, was void. I have supposed the defendant's acknowledgment to have been direct that he took under Mr. Baldwin as the attorney or agent of Hooker & Ives, for the jury might possibly have considered the defendant's declaration to Woodward as referring to them. Mr. Baldwin probably had no authority except from them. Yet I do not see how this is to detract from the adverse character of the defendant's possession. He took a deed, believing that he got a good title, either from Mr. Baldwin, from Hooker & Ives, or both, and under it held a possession actually adverse. Neither Mr. Baldwin nor Hooker & Ives had any title. It had passed to Charles G. Ives. But this was not known to the defendant, and he was in under such color of title as led to a belief of his right. He acted accordingly. It was not necessary, in order to create an adverse possession, that he should have a legal title. Suppose he had taken a deed from Hooker & Ives in person, clearly his possession would have been adverse, though their deed would have been void; and can the possession be considered less, because the deed came from their agent? Would not the possession which followed, running twenty-five years, have matured into a title? Mr. Baldwin's deed covered the whole lot, and the defendant was in actual possession of all the cultivated portion. His possession was clearly constructive in respect to the residue, according to all the cases decided by this court.

The certificates of acknowledgment were, we think, properly received in evidence. The objections to them, if all allowed, would destroy almost entirely the utility of the statutes, which declare a probate or certificate of ac-

knowledgment endorsed by certain officers upon a deed, to be *pri-*
[*92] *ma facie* evidence of its execution. If their official 'character,
their signatures, and that they acted within their territorial juris-
diction must be shown by extrinsic evidence, the party may as well, and in
general perhaps with more convenience to himself, procure the common law
proof. The practice is to take a certificate which appears on its face to be
in conformity with the statutes, as proof of its own genuineness. It need
only be produced. There is no need of extrinsic proof, such as showing by
whom it was made, any more than of a notary's certificate when received
under the commercial or civil law, *Chitty on Bills*, Am. ed. 1839, p. 642.
a; 2 Dom. tit. 1, § 1, pl. 29; or a clerk's certified rule of the court in
which the cause is pending. *Cowen & Hill's 1 Phil. Ev.* 388. Accord-
ingly, where the certificate describes the proper officer, acting in the proper

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place, it is taken as proof both of his character and local jurisdiction. *Rhoades' lessee v. Selin*, 4 Wash. C. C. R. 718. *Willink's lessee v. Miles*, 1 Pet. C. C. R. 429. *Vid. Morris v. Wadsworth*, 17 Wendell, 103, 112, 113. He is like an officer authorized to take testimony *de bene esse* under various statutes. *Vid. Ruggles v. Bucknor*, 1 Paine's C. C. R. 358, 362. Thompson J. there said, *prima facie* the officer is to be presumed, *de facto* and *de jure*, such as he is described to be. Indeed the certificate stands much on the same ground as the return to a special commission for taking testimony. There it would be deemed a singular objection, that the commissioners must be identified and shown to have proceeded regularly, by evidence collateral to the return.¹

The certificates purport to be taken at the place where the officers had power to act. That they acted within their territorial jurisdiction is therefore proved, even if it were not to be presumed without the fact being stated. The cases holding that certificates may be impeached because the act was done out of such jurisdiction, are those where the presumption was overturned, or offered to be, by collateral proof. *Jackson, ex dem. Walsh v. Colden*, 4 Cowen, 266, 278. *Jackson ex dem. Wyckoff, v. Humphrey*, 1 Johns. R. 498. Certificates of this character are not treated by the statutes as more than *prima facie* evidence; nor are they more either "in respect to their own regularity or the facts which they are adduced to prove. They are open to attack in a great variety of ways. *Vid. Cowen & Hill's Notes to 1 Phil.* 1249, 1250. They are, however, by recent statutes, made receivable to authenticate almost every kind of instrument; and to consider them less than *prima facie* evidence, *per se*, would render them literally useless, especially in those local jurisdictions where they are of most importance.

Although the statutes in terms required that these certificates should be endorsed, 1 R. S. 748, 2d ed. § 15, 1 R. L. of 1813, 369, § 1, they need not be followed according to the local import of the word. A certificate subjoined and expressing the same things *mutatis mutandis* as if endorsed, has the same effect, and may even be described in an indictment as an endorsement. *Rex v. Bigg*, 1 Str. 18. Being on the same sheet with the deed, there is no more chance for committing a fraud, than by an endorsement in form. A certificate thus subjoined passed without objection in *Jackson, ex dem. Merritt, v. Gumaer*, 2 Cowen, 532. This case also held that the certificate saying "A. B., to me known, came before me, one, &c, and acknowledged," &c. A. B. being in truth the name of the grantor, though the certificate omitted to say so, was a sufficient compliance with that part of the statute requiring the officer to state that the person named was well known, &c. to be the person described in and who executed, &c. This is

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even more than an answer to the objection now taken, in respect to the officer's certificates of knowledge.

Some of the points now made were not mentioned at the trial. Such is the objection that the deed from Hooker & Ives was void as a *trust deed* within the 1 R. L. of 1813, 75, § 1; and again, that no title was shown in them. It seems to have been assumed, on the trial, by both parties, that they once had title.

The effect of recording the deed from Asahel Hooker to Gaylord Wells before Mr. Baldwin executed the deed to the defendant, was not mooted at the trial, nor am I aware how it could vary the case if it had been.

[*94] "But a new trial must be granted, on the ground that the immediate deed to the plaintiff was void by reason of the defendant's adverse possession at the time.

New trial granted.

CAMERON vs. CHAPPELL and others.

Where an *acceptance* is given in consideration of a *promise* that the party obtaining the acceptance, will at a specified period deliver to the acceptor a quantity of country produce, the acceptor cannot avail himself of the defence of *usury*, if the acceptance be subsequently, and before maturity, negotiated by the holder at a usurious rate of interest.

THIS was an action on a *bill of exchange*, for \$797, drawn by Joseph Strangham, on the defendants, dated 12th December, 1836, payable to his own order five months after date. The defendants accepted the draft in consideration of a *promise* on the part of Strangham, to send the acceptors 600 bushels of wheat, to be shipped on the opening of navigation at Buffalo. The wheat was in *Canada*, and the acceptors resided at *Rochester*. Strangham, before maturity of the bill, had it discounted by an agent of the Commercial Bank of Upper Canada, who charged him beyond the *legal rate of interest* of Canada, one per cent for *agency*, in collecting, &c. The defendants insisted, by way of defence, that the bill was accepted merely for the *accommodation* of Strangham, and that consequently it having no legal inception until negotiated to the bank, they could avail themselves of the *usury*. Witnesses were examined on the part of the defendants to establish the facts alleged by them, and that not any wheat was received by the defendants from Strangham. The cause was heard by a *referee*, who reported in favor of the defendants. The plaintiff, in whose name the suit was prosecut-

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ed, for the benefit of the bank, moved to set aside the report and for a re-hearing.

S. Stevens, for the plaintiff.

E. Darwin Smith, for the defendants.

**By the Court*, NELSON, Ch. J. The only question made in [*95] the case is whether the defendants are to be regarded as accommodation acceptors, and standing in the light of sureties upon the paper, or as having parted with it to Strangham for value, to wit, on an engagement upon his part to pay the amount at maturity in wheat. If the former is the true exposition of the case, then the acceptance had no inception till the negotiation with the agent of the bank, and, therefore, is tainted with usury—if the latter, it is to be regarded as business paper in the hands of Strangham, and the transfer by him valid within the case of *Cram v. Hendricks*, 7 Wendell, 569.

No doubt, the promise thus to pay would be binding and constitute a good consideration for the acceptance of the draft, and the taking of it up by the defendants would be but the payment of their own debt, and not money paid for the use of the drawer. This is abundantly settled in the cases of cross notes or acceptances for the mutual accommodation of the parties—they are respectively considerations for each other. *Rolfe v. Caston*, 2 H. Bl. 570. *Cowley v. Dunlop*, 7 T. R. 565. *Buckler v. Buttivant*, 3 East, 72. *Rose v. Sims*, 1 B. & A. 521. *Rice v. Mather*, 3 Wendell, 62. *Byles on Bills of Exch.* 62. *Chitty on Bills*, 443. Mr. Byles lays down the proposition thus : if a man gives his acceptance to another, that will be a good consideration for a promise, or for another bill, though such acceptance be unpaid.

I have looked attentively into the facts of the case as disclosed by the three witnesses who were present at the arrangement between the parties, and am of opinion that the preponderance is decisively in favor of the conclusion, that the undertaking of Strangham to deliver wheat in the spring, constituted the consideration of the acceptance. His own account of it is express and precise, that he was to deliver 600 bushels, to be shipped at Buffalo. The other two are less distinct, but in the main, rather confirm than weaken this view of the transaction. They do not recollect that this precise quantity was fixed upon, but agree that it was the understanding to pay in wheat ; and one states that "he thinks the price was not [*96] to exceed 10s. 6d. which would bring the quantity about as stated by Strangham himself.

Again ; what affords a strong corroborative circumstance of Strangham's
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account, and that he was not the mere agent of the acceptors, as contended, is, that neither of the two witnesses pretend that the acceptance was not to be used except in the purchase of wheat. On the contrary, Alleyn states that it was understood if wheat could not be purchased on satisfactory terms, then Strangham was to put the acceptors in funds to take up the draft at maturity; impliedly conceding the right to use it as his own for any purpose, and that the acceptors would look exclusively to his personal responsibility for the liabilities they had assumed.

In all the cases to which I have referred in respect to counter bills or notes, it is conceded that there can be no remedy upon the implied promise of indemnity as in the case of principal and surety, or principal and agent, because the party had assumed his liability in consideration of a delivery of notes or acceptances to an equivalent amount, and therefore he must seek his remedy upon them; that the implied promise was negatived by the facts, and could not be raised *ultra* the bills or notes. This ground is very fully and satisfactorily examined by Lawrence, J. in *Cowley v. Dunlop*, and Lord Ellenborough in *Buckler v. Buttivant*.

So here, the defendants trusted to the undertaking to purchase and deliver the wheat as the consideration for the acceptance, and will be obliged to look to that for their remedy in case of failure to perform. They made the paper their own by the arrangement, and in taking it up they but pay their own debt.

Upon the whole I am satisfied the referee has mistaken the legal effect of the proof, and therefore the report must be set aside, costs to abide the event.

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**EHLE vs. JUDSON.*

The transferring to another a *bargain* for the purchase of land is not a good consideration of a note for the payment of money, where there is no *valid agreement* on the part of owner of the land to convey, and where the negotiation with him for the sale of the farm was made without any *request* from the maker of the note.

A mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, is not a sufficient consideration to support a promise.

THIS was an action of *assumpsit*, tried at the Madison circuit in September, 1838, before the Hon. PHILo GRIDLEY, one of the circuit judges.

The action was by the plaintiff as the holder of a note payable to Elisha Swift, or *bearer*, for the sum of \$100, transferred after maturity. The defence set up was *want of consideration*. The defendant had been in negotia-

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tion with one *James Blatherwick* for the purchase of a farm, but not agreeing as to the price and terms of payment, abandoned the negotiation. *Elieha Swift* then treated with *Blatherwick* for the purchase of the farm on his own account, and induced *Blatherwick* to agree to accept from him a *less sum*, and also to reduce the amount of the *cash payment* to be made on the conveyance of the property. *Swift* told *Blatherwick* that he *thought* he should take the farm. The agreement, however, was by *parol*. In this state of the negotiation, *Judson*, the defendant in this cause, solicited *Swift* to give up his bargain, and consent to his becoming the purchaser upon the terms which *Blatherwick* had agreed to accept from him. The latter assented to the proposal, provided *Judson* would give him his note for \$100, to pay him for his time and trouble in negotiating the purchase. *Judson* accordingly gave the note in question, and became the purchaser of the farm. Upon this state of facts, the defendant moved for a *nonsuit*, which was denied by the circuit judge, who held that this was the case of an *executed consideration*, the payee of the note had been put to trouble, and had by his address induced *Blatherwick* to "reduce his demands for the farm, [*98] which was an act beneficial to the defendant, upon which a promise to pay could be sustained; that no *actual request* from *Judson* to *Swift* to render the services performed was necessary to be shewn—that the law would *imply* a request. The jury, under the direction of the judge, found a verdict for the plaintiff, which the defendant now moves to set aside.

B. Davis Noxon, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, BRONSON, J. The note was given on a *past* or *executed* consideration. It was to compensate *Swift* for what he had done in negotiating for the farm, and obtaining the offer of better terms than *Blatherwick* had proposed to accept when the defendant was in treaty for the purchase. I am unable to see how this makes out a good consideration for the promise. *Swift* had not acted for the defendant, but for himself. The defendant had relinquished all idea of purchasing the farm before *Swift* commenced treating for it; and *Swift* neither acted at the defendant's request, nor with any view to his benefit: and beyond this, *Swift* had accomplished nothing, in a legal point of view. If a verbal contract had been completed, it would have been void under the statute of frauds. But he had not even made a void contract, if such an expression may be tolerated. He had only got an offer of terms from *Blatherwick*, and had told him he *thought* he should take the farm. The owner was under no obligation, not even honorary, to sell upon those terms, or to give *Swift* a preference over any other person, on whatever terms he might ultimately conclude to part with his property.

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Services voluntarily rendered, though they may be beneficial to another, impose no legal obligation upon the party benefitted. *Bartholomew v. Jackson*, 20 Johns. R. 28. The services must be rendered upon request, *Dunbar v. Williams*, 10 id. 259; and in counting upon a past consideration, [*99] a request must, in general, be alleged. *Comstock v. Smith*, 7 id. 87. *Parker v. Crane*, 6 Wendell, 647.

It is not necessary that there should be direct evidence of a request. This, like most other facts, may be established by presumptive evidence; and the beneficial nature of the services, though not enough when standing alone, may be very important in a chain of circumstances tending to establish the presumption. 1 *Saund.* 264, n. 1. *Oatfield v. Waring*, 14 Johns. R. 188. See also *Doty v. Wilson*, id. 378. But here the services were not beneficial to the defendant; and besides, we see that they were not and could not have been rendered upon request. Swift was not acting for the defendant in the negotiation with Blatherwick, but for himself.

We are referred to cases where it has been said that a moral obligation is a sufficient consideration to support an express promise. *Stewart v. Eden*, 2 *Caines*, 150. *Doty v. Wilson*, 14 Johns. R. 378. *Lee v. Muggeridge*, 5 *Taunton*, 87. But this rule must be taken with some qualifications. The moral obligation to pay a debt barred by the statute of limitations, or an insolvent's discharge, or to pay a debt contracted during infancy or coverture, and the like, will be a good consideration for an express promise. But a merely moral or conscientious obligation, unconnected with any prior legal or equitable claim, is not enough. 8 *Bos. & Puff.* 249, note. *Smith v. Ware*, 13 Johns. R. 257. *Lawes' Plead. Assump.* 54. 16 Johns. R. 283, note. But here the defendant was under no obligation of any kind to Swift. Nothing had been done at his request, or for his benefit. What Swift had done in negotiating for the farm was no more beneficial to the defendant, than it was to every other man in the state who might wish to buy a farm.

The plaintiff has often failed upon an express promise, in much stronger cases than this. I will only refer to two or three. In *Hunt v. Bate, Dyer*, 272, the plaintiff had, without request, become bail for the defendant's servant who was imprisoned, to the end that he might go about his master's business; and the defendant afterwards promised to indemnify the plaintiff. After verdict upon this promise, the judgment was arrested, because, as the court said, "there is no consideration wherefore the defendant [*100] should be charged for the debt of his servant, unless the master had first promised to discharge the plaintiff before the enlargement and mainprize made of his servant, for the master did never make request to the plaintiff for his servant to do so much, but he did it of his own head." In *Freer v. Hardenbergh*, 5 Johns. R. 272, the plaintiff had,

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without request, made valuable improvements upon the defendant's land, and the defendant afterwards promised to pay for those improvements; but the promise was held to be a *nudum pactum*, and judgment was rendered for the defendant. The case of *Smith v. Ware*, 13 Johns. R. 257, was also upon an express promise, and is equally decisive against maintaining this action.

New trial granted.

BLESSING vs. DAVIS.

In a declaration in *slander* charging the defendant with having adopted certain *slanderous words* used by another, the *words spoken in the first instance must be set forth*; it is not enough to say that the speaker did charge and impute to the plaintiff the *crime of perjury*.

THIS was an action of *slander*, tried at the Albany circuit in April, 1837, before the Hon. JAMES VANDERPOEL, then one of the circuit judges.

The several counts of the declaration (among other charges of direct and particular sets of confessedly slanderous words laid in various ways) sought to fix a slander upon the defendant as having adopted certain words previously used by one Batterman, and saying they were true. In order to introduce these words, the declaration recited the trial of a cause in a justice's court wherein the plaintiff was a party, and that an affidavit was made by him as the ground of an appeal, and averred that Batterman, in speaking of the cause tried, and the affidavit, &c. "did charge and impute to the said plaintiff, the *crime of perjury* in making said affidavit." It then went on to state that the defendant, speaking of the same cause, affidavit, &c. and of "the charge made by Batterman, said, "it is true, and [*101] adding the adoption of the words in various forms, among which were these: "What Batterman said about Blessing (the plaintiff's) swearing false, is true." On the trial, the plaintiff, among evidence tending to prove the directly slanderous charges as stated in the various counts, offered to prove the slander uttered by Batterman, which was objected to because the words were not particularized in the declaration. The judge allowed the objection, the plaintiff excepting; and the jury found for the defendant, on the other evidence, on the ground, as they stated, that the plaintiff had failed in proving his declaration.

The plaintiff moves for a new trial.

J. Van Buren, for the plaintiff.

S. Stevens, for the defendant.

New-York, May 1840.—*Blessing v. Davis.*

By the Court, COWEN, J. It is conceded that, had the defendant been charged as the originator of the slanderous words, the declaration would be bad in substance, by reason of its generality. *Ward v. Clark*, 2 Johns. R. 10, 13. But it is denied that the same particularity is requisite where the imputed slander consists in adopting the words of another. We can perceive no reason for the distinction. In the first case the object is to see whether the words imputed to the defendant by the declaration are slanderous in their character, and give notice to him so that he may know against what he is to defend himself. The same reasons obviously apply to the latter.

It is supposed that the only mode in which the defendant could avail himself of the objection, was by demurring or moving in arrest. And this would generally be so of counts entirely defective. In such case, if the defendant take issue, the action is maintained at the circuit, if the proof come up to it. But it is otherwise where the plaintiff states a sufficient cause of action, in the same count with another cause deficient in substance.

[*102] The course then may be to *reject the bad as surplusage, disallowing all proof in relation to it at the trial, and putting the plaintiff to sustain the good part. *Douglass v. Satterlee* 11 Johns. R. 16. That was done here.

New trial denied.

CASE vs. HALL & VAN ELTEN.

Want of title in the *vendor* of personal property [is no defence to an action brought for the recovery of the purchase money, where there has been no recovery by the *owner* against the *purchaser*.

If the vendor *fraudulently* represents himself to be the owner, when he *knows* to the contrary, such facts may be set up in bar of a recovery ; or it seems an action *on the case* may be brought against the vendor.

THIS was an action of *assumpsit*, tried at the Tompkins circuit in September, 1839, before the Hon. ROBERT MONELL, one of the circuit judges.

The plaintiff read in evidence two promissory notes made to him by the defendants for the sum of \$424,83. The defendants under a notice given with the plea of the general issue offered to prove that the notes were given for lumber purchased by them of the plaintiff, who had cut the same *on land belonging to Edmund Wilkes* ; that the plaintiff had a contract for the land, but had not paid for it, and had not any right to cut the timber ; that the defendants sold the lumber thus purchased by them, but that after such sale

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Wilkes gave them notice that the lumber belonged to him, demanded it, and told them that they would be held responsible for it. The defendants admitted that no recovery by Wilkes against them had been had, and that no suit had been commenced by Wilkes against them. The counsel for the plaintiff objected to the admissibility of the evidence and it was rejected by the judge under whose direction the jury found a verdict for the plaintiff. The defendants move for a new trial. The cause was submitted on written arguments.

**J. M. Parker*, for defendants.

[*103]

C. Humphrey, for plaintiff.

By the Court, NELSON, Ch. J. There is no doubt if the vendor *fraudulently represents* the goods sold to be his own, when he *knows* them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property, nor the vendee suffered any actual damage. 1 *Show.* 68. *Cro. Eliz.* 44. 1 *Salk.* 210, 211. 1 *Ld. Raym.* 593. *Selw. N. P.* 482, 483, and cases. 2 *East*, 448, n. *Ross on Vendors*, 334. And then upon the case of *Becker v. Vrooman*, 13 *Johns. R.* 302, the same matter might be admissible by way of defence for the purpose of reducing or extinguishing the claim for the purchase money. See also 15 *Johns. R.* 230, and 8 *Wendell*, 109. Where, however, the vendee relies on the *warranty of title*, express or implied, there must be a recovery by the real owner before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach of the contract in analogy to the case of covenants real. *Vibbard v. Johnson*, 19 *Johns. R.* 77. 1 *id.* 274, 517. 6 *id.* 5. 13 *id.* 224. 5 *Wendell*, 535. *Ross on Vendors*, 334.

In *Vibbard v. Johnson*, it is true, that the purchaser knew the property had been claimed by a third person, but that fact has never been regarded as material to the decision of the case; nor is it noticed in the opinion delivered by the court. On the contrary, the right to recover the purchase money is put upon the broad principle, that the only competent evidence of a breach of the implied warranty of title, was a recovery at law. It was likened to a demise of a house, where the tenant attempted to defeat the recovery for rent by denying the title of the lessor, and claiming to have paid it to C., the owner.

The principle is well sustained by analogy, and, I think, just in itself. In case of a breach of warranty, the measure of damages is the purchase money and interest. Now, it would be highly inequitable to permit the vendee to retain *the possession, or enjoy the use of the property thus acquired, and put his vendor at defiance. Possibly the [*104]

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owner may never claim, and enforce his title, or if he does, the seller may settle with him. The breach implies no bad faith, and, therefore, is compatible with perfect fair dealing between the parties ; and the indemnity is complete by responding therefor after a recovery under the paramount title.

If there has been fraud in the case, the remedy is immediate for all the damages the parties have sustained, and to which they may resort if they apprehend loss from delay in the claim of the owner.

The counsel for the defendant, in an ingenious brief, has likened the case to the covenant of seizin, and right to convey where the action accrues immediately, without an eviction ; but this would be extending the *implied warranty*, in this case, beyond the analogous cases of lands and chattel interests ; it is there regarded as a covenant of warranty only, not of seizin. *7 Johns. R.* 258.

It is further insisted, that the facts embraced in the offer shew fraud on the part of the plaintiff, and upon that ground should have been admitted under the rule of *Becker v. Vrooman*. I think not. There was no offer to prove guilty knowledge. A man may very well be mistaken in respect to his title ; and we cannot, therefore, presume a knowledge of the defect. All the cases before referred to on this point, show the *scienter* to be material, and that it must be proved affirmatively. Though the plaintiff occupied under a contract of sale, he may have honestly supposed that he had a right to cut the timber, notwithstanding the law is otherwise.

New trial denied.

[*105]

*COOPER vs. BARBER.

Where a party is sued for republishing a *libellous article* in a newspaper, and the republication is accompanied by remarks *tending* to a justification of the article but not amounting to it, the defendant is not permitted to prove the truth of the remarks in *mitigation* of damages, because the evidence would tend to prove the charge well founded. Evidence in mitigation must be such as admits the charge to be false. A judge at the circuit may, upon his own motion, exclude evidence which he deems *irrelevant* ; he is not bound, although the opposite party does not object, to sit and hear testimony which can have no legal bearing upon the question to be tried.

THIS was an action for a *libel*, tried at the Montgomery circuit, in May, 1839, before the Hon. JOHN WILLARD, one of the circuit judges.

The defendant was the editor of a newspaper called the *Otsego Republican*, and on the 14th of August, 1837, republished in that paper an article from another paper called the *Chenango Telegraph*, which commenced as follows—“ J. FENIMORE COOPER. This gentleman, not satisfied with having

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drawn down upon his head universal contempt from abroad, [meaning Europe,] has done the same thing for himself at Cooperstown, where he resides." The article also contained other imputations upon the plaintiff which were held to be libellous on the trial, without any objection on the part of the defendant to the ruling of the judge in that respect. The defendant published the article, with remarks of his own in relation to a controversy which had arisen between the plaintiff and some of the citizens of Cooperstown in relation to *Three-mile point*, a piece of land projecting into Otsego lake. No part of the defendant's remarks was pointed out on the trial as being libellous. The plaintiff's counsel made a full opening, as though prepared and willing to go into the whole matter relating to the point, if the defendant should desire it. After proving the publication, and admitting that what the defendant published as purporting to come from the *Telegraph*, was in fact copied from that paper, the plaintiff rested.

The defendant, with the plea of not guilty, had given notice of [*106] special matter in justification, in which he alleged that he had republished the *Telegraph* article with good motives ; and then went on to say, that evidence would be given in relation to the controversy about the Point, which, as it was set forth in the notice, tended to support the account which the defendant had given of the matter in his remarks. When the defendant's counsel sat down, after opening the defence, the judge stated that he had looked over the pleadings, and feeling satisfied that the matters set forth in the notice did not amount to a justification and were irrelevant, he should, without waiting for any application for that purpose, exclude evidence of those matters. To this opinion the defendant excepted. The defendant then offered to prove those matters in mitigation of damages. The judge said the evidence was not admissible. Exception. The defendant then offered to prove that every fact stated in his remarks as published, was true. The judge overruled the evidence, and the defendant excepted. After the cause had been summed up by the counsel, the judge charged the jury, to which no exception was taken. The jury having found a verdict for the plaintiff, the defendant now moves for a new trial on a bill of exceptions.

J. A. Spencer, for defendant.

R. Cooper, for plaintiff.

By the Court, BRONSON, J. The defendant republished in his paper an article from the *Chenango Telegraph*, certain parts of which were pointed out on the trial as being libellous. He accompanied the republication with remarks of his own, none of which were mentioned at the trial as being actionable. The notice annexed to the defendant's plea, affirmed the truth of

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some of the facts mentioned in his remarks. This is the most that can be justly claimed for the notice. It was insufficient, and the evidence which the defendant offered under it, would have been inadmissible, although [*107] nothing had been in question but the statements "which the defendant made in addition to the *Telegraph* article. But when we look at the objectionable parts of that article, it is impossible to say that the facts set up in the notice furnished any answer whatever to the publication.

But if we lay out of view the question about the sufficiency of the notice, and assume that the pleadings were in the proper form in reference to all the evidence which was offered, it will not aid the defendant's case. It is a familiar principle in the law of libel, both in relation to the pleadings and the proofs, that the defendant must answer the particular charge which he has made, and that the justification must be as broad as the imputation upon the plaintiff's character. *Andrews v. Vanduzer*, 11 Johns. R. 38. *Mitchell v. Borden*, 8 Wendell, 570. *Stilwell v. Barter*, 19 id. 487, and cases cited. Now, if the defendant had proved, according to his broadest offer of evidence, that every fact stated in his remarks was true, it would have made out neither justification nor excuse for publishing other matter, which was libellous. Good morals, as well as the law, forbid, that the addition of some truth should be deemed a palliation of the wrong of publishing a libel.

If the remarks had in themselves any tendency to disprove malice, or counteract the injurious effects of the slander, the defendant had the full benefit of that consideration on the trial; for the remarks were not only read to the jury in connexion with the *Telegraph* article, but the jury took the paper with them on retiring to deliberate; and they were left at full liberty to put the most favorable construction upon the defendant's motive in making the republication, which could be drawn from the manner in which it was done. If the one was in any degree an antidote to the other, the jury have undoubtedly made the proper allowance. But if we should assume the contrary, we could not correct their estimate of damages on a bill of exceptions.

Facts and circumstances which tend to disprove malice, by showing that the defendant, though mistaken, believed the charge true when it was made, may be given in evidence in mitigation of damages. But if the facts and circumstances offered, tend to establish the truth of the charge, [*108] "or form a link in a chain of evidence going to make out a justification, they are not admissible in mitigation of damages. In short, evidence going only to the damages, must be such as admits the charge to be false. *Gilman v. Lowell*, 8 Wendell, 573. *Purple v. Norton*, 13 id. 9. The evidence which the defendant offered, although it fell far short of the mark, tended to make out a justification. It did not admit that the charge was false. The defendant did not propose to disprove malice by

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showing that he acted upon mistaken information concerning the facts of the case : but, on the contrary, he still affirmed the truth of his remarks. As a bar to the action, the evidence was inadmissible, because the justification was not so broad as the imputation upon the plaintiff's character ; and it was not proper evidence in mitigation of damages, for the reason, that so far as it went, it tended to prove the charge well founded.

What influence the evidence might have had upon the jury in estimating damages, no one can tell. It is matter of mere conjecture. But upon established principles, it could have no legitimate bearing upon the question, and was therefore properly excluded.

The ground on which the defendant's counsel mainly relied for obtaining a new trial, was, that the judge overruled the evidence on his own motion, when the plaintiff not only made no objection, but seemed willing to go into the whole controversy in relation to Three-mile point. If the judge had acted on the sole ground that the notice was insufficient, the defendant would, perhaps, have some reason to complain of the decision. Objections to the form of the pleadings may be waived by the parties. But the evidence was excluded on the ground that it was in its own nature irrelevant. It could make out neither justification nor excuse for republishing the Telegraph article. And although the plaintiff might not be disposed to restrict the defendant in any evidence which he wished to give, the judge was not obliged to burden himself and the jury, and to delay other suitors, by entering upon the investigation of matters which could have no legal bearing upon the question to be tried.

This is a bill of exceptions, and it only reaches those *questions of law in which the party was overruled on the trial. No exception was taken to the charge ; and I am unable to see any ground which will authorize us to disturb the verdict.

New trial denied.

STOCKHOLM *vs.* ROBBINS.

A re-taxation of a bill of costs will be ordered when demanded by an attorney either of his own *client* or of the *opposite party*, even after a discontinuance of the suit and payment of the money, upon complaint of error in the taxation.

The same rule does not invariably prevail between *attorney* and *client*, as between *party* and *party*, in respect to the *amount* of costs to be recovered.

An attorney, however, is not entitled to charge his client for swelling an original writ by *special counts* spread out in the writ when the common *money counts* would have sufficed.

THIS was an action of *assumpsit* tried at the Tompkins circuit, in February, 1839, before the Hon. ROBERT MONELL, one of the circuit judges.

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The suit was brought for the recovery of bills of costs in two suits prosecuted by the plaintiff, as the attorney of the now defendant against the *Tompkins County Bank*, during the suspension of *specie payments* by the banks in this state. The suits were by *original*, setting forth the causes of action in full on numerous *bank bills* as on promissory notes, and also under the common money counts; the summons in one case containing 272 and in the other 294 folios. The originals were returnable in January term, 1838. Previous to the return day, *Robbins* and the *Tompkins County Bank* submitted the suits to *arbitration*, the bank agreeing to pay the *taxable costs* of the suits. On the 18th December, 1837, the arbitrator made his award, directing the bank to pay the amount of the bills for the non-payment of which the suits had been brought, with *ten* per cent damages. On the 29th January, 1838, *Stockholm*, on due notice to the attorneys of the bank, had the costs taxed in one suit at \$152,50, and in the other at \$141,50.

[*110] In March *following, the bank applied to this court for a re-taxation, which was ordered, and the taxing officer directed to strike out from the bills all charges for causes of action stated in the writs of summons, except those stated in the money counts.

The attorney, *Stockholm*, then commenced this suit against his client *Robbins*, demanding the full amount of *costs as taxed* in *January*, and delivered a *bill of particulars*, setting forth the taxed bills as items of his claim. On the trial of the cause the above facts were shown. The plaintiff objected to the evidence of the order for re-taxation, insisting that the suits against the bank, having been submitted to arbitration were out of court, and, therefore, an order for re-taxation could not legally be made; and secondly, that he, the attorney, having been deprived, by his client, of the control of the suits by submitting them to arbitration, was not bound by the order for re-taxation, and should not be held to be affected by it. The judge overruled the objection, and it was then proved that the costs in the suits against the bank, taxed according to the direction of the court in the rule for re-taxation would not exceed *nineteen dollars*. The defendant claimed by way of *set off*, the sum of \$86, for money paid by him to a third person for *copying* a portion of the original writs, and for his own services in *copying* another portion of them, the portions thus copied by the defendant and by his procurement amounting to about 1100 folios. The circuit judge charged the jury that the writs of summons would have been good had they contained only the money counts, but if they should come to the conclusion that the attorney believed in good faith that it was necessary to the interests of his clients, that the writs should be drawn up in the manner they had been, he was entitled to be paid for his services, and they should allow him what they should conclude he reasonably deserved to have. The

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jury found a verdict in favor of the *defendant*, and certified a balance in his favor of *twenty dollars*. The plaintiff moves for a new trial.

D. B. Stockholm, in pro per.

C. Humphrey, for defendant.

*By the Court, COWEN, J. I do not think the power of this court [*111] to fix the amount of costs by ordering a re-taxation, would be gone even by a voluntary settlement of a cause, payment of the money and actual discontinuance ; much less, I should suppose, where it is merely constructive, as by a submission to arbitration. The court may direct a re-taxation of costs, irrespective of the actual pendency of a suit in which the taxation is to operate, and often do so as between attorney and client. The right and duty to do this, arises from the general authority of the court over attorneys as its officers : one branch of which is the power to prevent improper exactions either from the opposite party or their own clients. *Wadsworth v. Allen*, 1 Chit. R. 186. *Starr v. Vanderheyden*, 9 Johns. R. 258. *Vid. also Kellogg v. Potter*, 11 Wendell, 170. The plaintiff, therefore, relying on the taxation of the commissioner as evidence for himself, was bound to take it with the deductions made by the rules on the motion to retax. Whether that deduction, which was made as between party and party, should in all cases conclude as between attorney and client is another question. The attorney may, in his over doing, act in good faith, on a real doubt whether it be not necessary ; and though his services be reduced as to the opposite party, may possibly, notwithstanding, recover against his client for the whole ; but hardly, I should think, in a case like this, where he makes the very bills cut down by the court his bill of particulars and his evidence on the trial. The judicial act on which he sought to recover, had been reviewed on appeal and reversed. Independent of that, I apprehend, the rule in a matter of this kind, would be about the same between attorney and client as between party and party. In both cases, the extent of taxation would depend on the intent, to be collected from the utility or the obvious inutility of the act. *Vid. Willink v. Reckle*, 11 Wendell, 81. Be all this as it may, however, the judge thought the bills open to the question of good faith, and put the distinction to the jury, with instructions to act upon it, and allow them in full, should they conclude that the plaintiff performed this excess of labor under a belief that it was necessary. He explained to *them [*112] the law and the practice which governs in the use of the special and general counts on promissory notes, thus placing before them, as far as possible, the materials for forming a correct conclusion. The plaintiff cannot complain that the legal ground of his claim has been improperly narrowed. The jury found that so much writing was not performed in good faith.

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It struck them, I suppose, as it certainly did me, when I ordered the re-taxation, that all the folios beyond the money counts were drawn out with the single purpose of swelling the costs against the bank.

It is now said that special counts were necessary to indicate the claim of 10 per cent. by way of damages, which this bank is, by its charter, *Sess. L. of 1831*, p. 512, § 31, made liable to pay after demand; at least that this view raises a doubt on the mode of declaring, which would warrant the precaution taken. It seems, that in fact, the counts in question were framed so as specially to claim the damages. Thus, a considerable addition was made to each count, and the aggregate folio increased a good deal. This is the first time I have heard of that argument. It was not mentioned on the motion to re-tax; nor could it have changed the result. It must have naturally occurred to any legal mind, on considering the words of the statute with no more than ordinary care, that it was not intended to affect the form of declaring; but that the claim to the 10 per cent. would be raised by evidence under the ordinary counts, as in common cases. It was the direct consequence of this bank refusing payment, as much so, as if each note had expressed the obligation. It followed, the same as interest at 7 per cent. would do on a common promissory note. It was the law of the contract; and a declaration need never claim damages specially, which are a direct consequence of the case made out by evidence. This is a familiar rule of pleading.

In the most favorable view, it cannot add to the argument of *bona fides*, that this mere legal effect or claim of 10 per cent. is added to each special count, with great detail, instead of being appended, once for all, at the conclusion of the whole.

New trial denied.

[*113]

BENNETT vs. INGERSOLL.

A court of common pleas in an *appeal case*, are bound to pronounce on all *questions of law* raised and passed upon in the court below. Where such court refused to hear and decide upon a question of the *sufficiency of an affidavit*, presented upon the application for an attachment in the court below, and such affidavit was in fact *insufficient*, the judgment of the common pleas was reversed.

It seems, a party may sue out an *attachment* from a justice's court, although his demand exceed the jurisdiction of the court, provided that the sum for which judgment be *claimed* is within its jurisdiction.

ERROR from the Tompkins common pleas. Ingersoll commenced a suit by *attachment* against Bennett in a justice's court. He made affidavit that Bennett was justly indebted to him on demands arising upon contract, in the

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sum of \$200, over and above all discounts, &c. and that the application made by him for *four attachments of fifty dollars each*, was made on the ground that Bennett had departed from the county, and removed and disposed of his property, with intent to defraud his creditors, *as the deponent believed*. The affidavit did not state *the facts and circumstances* upon which the application was founded. 2 R. S. 230, § 28. The justice thereupon issued *an* attachment, the parties appeared before him, the plaintiff declared upon an order for the payment of money, and demanded \$50 or under. The defendant moved that the proceedings be set aside, on the following grounds : 1. That the plaintiff having sworn to an entire demand of \$200, could not split it up ; and 2. That the *affidavit* upon which the attachment had issued, was insufficient, in not setting forth the facts and circumstances upon which the application for an attachment was founded. The justice denied the motion. The defendant thereupon joined issue and went to trial, and the justice rendered a judgment against him for \$49,49. The defendant removed the cause by *appeal* to the Tompkins common pleas, and on the cause coming on to a hearing in that court, moved that the proceedings before the justice be held as of no effect, or that the plaintiff be nonsuited *for the insufficiency of the affidavit*. The court denied [*114] the motion, and directed a jury to be empanelled to try the issues of fact joined before the justice. The defendant excepted to the decision of the court. The cause was tried and a verdict found for the plaintiff. The defendant sued out a writ of error.

Ben Johnson, for the plaintiff in error.

J. Holmes, for the defendant in error.

By the Court, NELSON, Ch. J. It was intended by the legislature that by the appeal, the cause should be transferred bodily from the justice to the common pleas, and a trial *de novo* take place between the parties upon the issues formed by the pleadings below. But after the cause is thus removed, and in possession of the court, it must surely have the power to entertain any motion, that may properly arise upon the facts, and which goes to the foundation of the action.

The objection to the affidavit was fatal to the whole proceedings. 16 Wendell, 562, and cases. See also 13 id. 46. Whether the judgment on the appeal would have been any better than the one before the justice, it is not material now to examine. The question before the justice was one of law, and might, perhaps, be regarded in the light of an issue in law there, which he should have decided for the defendant ; and regarding the manner in which objections of this nature are entertained on *certiorari*, the fact of

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the defendant's being compelled to plead, should not here be deemed a waiver of the point. 17 *Wendell*, 85. The appellate court, then, should have entertained this question, and reversed the judgment below for the error in the affidavit.

The affidavit shewing an indebtedness in \$200, when the jurisdiction of the justice extended only to \$50, was, perhaps, well enough, as the plaintiff claimed only the latter amount. Certainly he could not split his demands and take out four attachments ; a recovery on one would extinguish the entire demand. This point, however, does not appear in the case.

Judgments reversed.

[*115] ***BANK OF SANDUSKY vs. SCOVILLE, BARTON & MOONEY.**

Where a bank discounts a note to extinguish a debt due to it from the holder, or the proceeds are applied towards discharge of his liability, such acts are equivalent to *paying value at the time*, and constitute the bank, holders for valuable consideration.

THIS was an action of *assumpsit*, tried at the Erie circuit in January, 1839, before the Hon. NATHAN DAYTON, one of the circuit judges.

The action was on a note for \$500, dated May 11, 1837, made by the defendant *Scoville*, payable sixty days after date, at the Bank of Buffalo, to the order of the defendant *Barton*, and endorsed by him and the defendant *Mooney*. The defence was *usury*. It was an accommodation note, which had been discounted at an usurious rate of interest by *Henry D. Ward*, a broker in Buffalo, and by him negotiated to the plaintiffs. *Ward*, in his deposition, testified that he passed the note to, and it was discounted by the plaintiffs, in June, 1837, to extinguish a debt due by the witness to the plaintiffs : and again he said the note was discounted by the plaintiffs for his benefit, and the avails went so far to discharge his liability to them. The plaintiffs had no knowledge of the usury. The judge ruled that the plaintiffs were *bona fide* holders, and entitled to recover. Exception. Verdict for plaintiffs. Defendants move for a new trial.

S. Stevens, for defendants.

A. Taber, for plaintiffs.

By the Court, BRONSON, J. The note was transferred before the usury act of 1837 took effect ; the plaintiffs received it in good faith, without any

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notice of the usury, and the only question is, whether they paid a valuable consideration. 1 R. S. 772, § 5. It think they did. It is not the case of a note received in security for a precedent debt, without parting with any thing at the time. The note was *discounted* by the plaintiffs for the benefit of Ward, to *extinguish* his debt and the avails went to *discharge* his liability to the "bank. I cannot understand this language as [*116] meaning less than that the proceeds of the note were actually applied to the use of Ward. It is the same thing, substantially, as though Ward had first received the money and then paid it over to the plaintiffs, or, indeed, to any other creditor. If Ward's liability was discharged—his debt extinguished—it is impossible to deny that the plaintiffs, in effect, parted with their money, and that Ward received it. In *The Bank of Salina v. Babcock and others*, 21 Wendell, 499, the old notes were *charged over* and *cancelled* by the bank ; and although not actually given up, we held that the bank was a bona fide holder for value of the new note which had been discounted to take up the old ones. The principle of that case is, I think, decisive in favor of the plaintiffs.

We were referred by the counsel for the defendants to the case of *The Ypsilanti Bank v. Martin and others*, decided on the argument at July term, 1839. I have looked into the papers in that case, and it does not appear that the bank had parted with the proceeds of the note, by either paying over the money to *Stevens & Co.*, or applying it in *satisfaction* of their debt. We thought the plaintiffs had not made out, that they had *in any way* paid value for the note, and on that ground the report of the referee was set aside.

New trial denied.

WHITE vs. COLE & THURMAN.

Where a schooner was mortgaged for a precedent debt whilst out on a voyage from Oswego on Lake Ontario to Cleveland on Lake Erie, and delivery of the property was not made until after a levy of an execution against the mortgagor in favor of a third person, it was held, that as against a purchaser under the execution, the mortgage was void within the meaning of the 5th § of the act relative to fraudulent conveyances ; that although the absence of the vessel from port at the time of the execution of the mortgage was a sufficient excuse for not changing the possession, such excuse ceased when the vessel returned to port and possession was not forthwith taken by the mortgagee.*

*The exceptions to § 5, specified in § 7 of the same act, to wit, contracts of *bottomry* or [*117] *respondentia*, and assignments or *hypothecations* of vessels or goods at sea or in *foreign ports*, refer to loans made or moneys borrowed in reference to a particular voyage or

* *Sed vid. Smith & Hoe v. Acker*, 23 Wendell, 653.

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voyages, are of a nautical character, and do not apply to mortgages of personal property in their ordinary sense.

The general doctrine of this court in reference to personal mortgages vindicated.

A purchaser at a sheriff's sale of personal property incumbered by a mortgage, will be deemed to purchase only the *equity of redemption*, where the mortgage is a *valid instrument* and the purchaser has notice of its existence; but not so where the mortgage is *fraudulent*, and the purchase is made *adverse* to the claim of the mortgagee.

It seems, a mortgage of personal property is *not a pledge* within the meaning of the statute. (2 R. S. 290, § 20, 2d. ed.) authorizing the sale of the interest of the *pledgor*. A pledge as applied to chattels is a *bailment*, that is, an actual delivery of the thing for the security of some engagement. After the title of the mortgagee has become absolute, the statute cannot divest it, and the property is not the subject of execution.

A mortgagor of personal property is an incompetent witness for the mortgagee in a controversy between the latter and a purchaser under an execution issued *subsequent* to the execution of the mortgage, where such instrument is *void* for want of possession of the goods accompanying its delivery, and *actual possession* is not taken by the mortgagee until after *levy* by virtue of the execution.

THIS was an action of *trover*, tried at the Oswego circuit in December, 1838, before the Hon. PHILo GRIDLEY, one of the circuit judges.

The suit was brought for an undivided half of a schooner called the *Deming*, her tackle, apparel and furniture, purchased by the plaintiff on the 9th March, 1838, at a sheriff's sale, by virtue of an execution issued on a judgment in favor of the Commercial Bank of Oswego against *Frederick W. Deming, Chester Deming, Charles Smyth and John A. Smith*, docketed 16th October, 1837, for the sum of \$149,77. The execution was tested on the day of docketing of the judgment, was returnable 28th October, 1837, and was delivered to *Francis Rood*, a deputy of the sheriff of Oswego, on the 19th October, who two days thereafter made a levy upon the schooner, by going on board of her, where he found no one, but within three days thereafter informed one of the defendants in the execution of the levy made by

him. The Demings at that time had the possession of the vessel, [*118] and continued in possession until December; they resided at *Oswego*, and were or had been the owners of the one half of the schooner, and Messrs. *Williams & Hollister* of *Utica* of the other half. The vessel was registered at *Oswego* on the 7th August, 1837, in the names of the owners, and was sailed by John Ripson as master, from the time of her registry until she was laid up in December. Before the vessel commenced running, it was agreed between the owners that the *Demings* should run her throughout the season for the joint account of all the owners. At the time of the sale by Rood, an agent of Alsop Weed, Jared S. Weed and Richardson Thurman, the latter persons residing at *Troy*, gave public notice that Messrs. Weed and Thurman were in possession of the one half of the schooner by virtue of a mortgage of the same executed to them by the two Demings. After the property was put up for sale, the present plaintiff

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inquired if it was one half that was to be sold ? to which *Rood* answered, that he sold the right, title and interest of the *Demings* only, that he would not guarantee that they had any title, and that the purchasers might fight it out. The vessel was struck off to the present plaintiff at *three dollars*, which was the highest sum bid. The value of the vessel was estimated by the witnesses at from \$4000 to \$6000. The plaintiff rested.

The defendants proved that on 25th August, 1837, the Messrs Demings executed a *mortgage* of an undivided half of the schooner in question to Messrs. Weed and Thurman, conditioned for the payment of \$2000, on the first day of September then next, and authorizing the mortgagees in case they deemed themselves insecure to take possession of the vessel previous to the day of payment and to sell her, applying the proceeds to the payment of the debt. The mortgage was filed in the town clerk's office of Oswego on the 28th August, 1837. The plaintiff admitted that the Messrs. *Demings* were indebted to the mortgagees in the sum specified in the mortgage at the date thereof, and that the mortgage was executed to them at their solicitation, and it was proved that at the date of the mortgage the vessel was not at *Oswego*, having sailed from there on the 10th August for Cleaveland, and not having returned to Oswego *until the 2d September; [*119] between which day and 24th December she performed four other voyages when she was laid up for the winter. The defendants also proved that on the 28th December, 1837, the Messrs. Demings executed a bond and warrant of attorney to the Messrs. Weed and Thurman conditioned for the payment of \$1966,90, by virtue of which, judgment was entered on the 30th December. The bond and warrant were executed as additional security for the debt specified in the mortgage, and it was agreed between the parties that the mortgage should continue in force. On the judgment thus entered an execution was issued and delivered to *Cole*, a deputy sheriff of Oswego, (one of the defendants in this cause) on the 30th December, 1837, and on the 28th March, 1838, he sold the vessel at public vendue by virtue of the execution and the mortgage executed to Messrs. Weed and Thurman, the latter being the purchasers at the sale, and *Thurman*, one of the defendants in this case, having indemnified the sheriff. The defendants also proved that on the 28th December, 1837, a formal delivery of the schooner, her tackle, apparel and furniture, was made by the Messrs. *Demings* to Messrs. Weed and Thurman under the *mortgage*, and she was placed by them in the charge of an agent. Evidence was given for the purpose of showing that a levy was not in fact made by *Rood* under the execution in favor of the Commercial Bank previous to the return day thereof. *Frederick W. Deming* was offered as a witness on the part of the defendants, he was objected to as incompetent on the ground of *interest*, and the objection was sustained by the judge.

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The evidence being closed, the counsel for the defendants insisted, 1. That the vessel not being in *port* at the time of the execution of the mortgage, this case is *within the exceptions* to § 5, as specified in § 7 of the title to the statutes respecting fraudulent conveyances; 2. That the plaintiff having notice of the mortgage, purchased merely the *right* of the *Demings*, and of course purchased subject to the mortgage; 3. That the mortgage having

[*120] been made for an adequate consideration, in good faith, and without any intent *to defraud, was a valid conveyance, and entitled to a preference over the judgment of the Commercial Bank; 4.

That the question of *fraudulent intent* was a question for the *jury* and not for the court; 5. That the circumstances of the case—the property mortgaged being undivided; arrangements having been made for running the vessel throughout the season, with which the mortgages could not interfere; and the distance of their residence from Oswego, were sufficient reasons to account for possession not accompanying the conveyance; 6. That there was no legal *levy* under the execution of the Commercial Bank, and that this question should be submitted to the jury; and 7. That the *nominal sum of three dollars* was not a sufficient consideration to support the sale, and that the question should be submitted to the jury, whether, under the circumstances of the case, the sale was not fraudulent. The circuit judge thereupon delivered his *opinion*: that the case did not fall within the exceptions specified in the 7th § of the act concerning fraudulent conveyances; that the plaintiff, under his purchase, took all the interest of the *Demings* in the vessel which the plaintiffs in the execution had a right to sell; that under the rule adopted by the supreme court it was not enough to show a good consideration for the mortgage, but that a good reason for not delivering possession must be shewn, and that though the fraudulent intent is a question of fact, yet the reason for not delivering the possession of the property, though it consists of facts, must, on the authority of several cases, be facts which by the rules of law afford good reason for such non-delivery; and that in his opinion the facts shewn in this case did not upon those authorities furnish any such good reason for the non-delivery, not only before the forfeiture of the mortgage, but for a long time thereafter, even until the close of the season; that a creditor or purchaser looking at the mortgage on file, and seeing the time elapsed for the fulfilment of the condition and observing the property still in the possession and use of the *Demings*, might justly conclude that

[*121] the debt was paid; that possession might have been taken by the agent of the defendants, at any time after the forfeiture when *the vessel was in port; that the smallness of the sum bid by the plaintiff did not affect the validity of the sale, the agent of the defendants being present at the sale; that the *levy* was valid if made in the manner testified to by the deputy, but the facts in reference to the *levy* would be submitted

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to the jury, and that the only questions for the jury were whether a proper levy had been made, and if they should find in the affirmative, then as to the amount of damages to be awarded to the plaintiff. After the counsel for the parties had addressed the jury upon the questions designated by the judge to be submitted to them, the judge charged the jury, who found a verdict for the plaintiff for \$1750. The defendants, on a *case* made, asked for a new trial.

S. Stevens, for the defendants.

W. F. Allen, for the plaintiff.

By the Court, COWEN, J. The statute under which the plaintiff claims title, 2 R. S. 70, 2d ed. § 5, declares, among other things, that every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied with an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers. Subsequent sections 9 and 10, *id.* 71, declare such a mortgage absolutely void without any qualification, unless it be filed in the clerk's office of the town where the mortgagor resides. In the case at bar, the mortgage being filed, must stand or fall by the 5th section, unless it come within the 7th, *id.* 70, concerning bottomry and respondentia, and assignments and hypothecations of vessels at sea, or in foreign ports.

"Taking the case upon the 5th section, it comes to us with a [*122] shade of difference from those which have heretofore been presented for our consideration. Is this a mere difference of fact or principle? The vessel being, at the time when the mortgage was executed, abroad on her trip to Cleaveland, an immediate delivery was impracticable, and this doubtless furnished a legal excuse for postponing the time. The statute required the immediate delivery in general terms, but allowed the defendant to excuse it by showing circumstances tending to neutralize the presumption of fraud, which would otherwise be derivable from the omission to comply; and, that the vessel was abroad on the lake, perhaps in a distant port, was calculated at once to relieve the mind from suspicion. But clearly this could no longer be so, when the excuse ceased to operate, by the return of the vessel into the port of Oswego, much less in all future time during her repeated ar-

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rivals both before and after the mortgage become forfeited by non-payment of the money secured. In such an event, the mortgagees were expressly authorized by the Demings to take possession, and sell the schooner for the payment of the debt. After her return, therefore, the negligence was calculated rather to excite than allay suspicion that the purpose was something more than merely to secure payment. The debt might have been very honest in the abstract, but might, for that very reason be made a more dangerous instrument in working a fraudulent delay of other creditors. Every statute made to suppress fraud should be construed liberally for the promotion of that end. The principle of the exception should be regarded. The fact of the vessel not being in port, excused the immediate delivery ; but giving to that fact the same operation, after the vessel was perfectly within the control of the mortgagees, would be straining a point in favor of parties engaged in using the very means which the statute had regarded as strong proof of fraud being intended. It would be so construing the statute as to promote, not to remedy the evil. It would be saying to parties, “watch your opportunity, mortgage while the vessel is abroad, and then you are ab-

[*123] solutely beyond the reach of “the statute. If you are so lucky as to escape detection from other kinds of evidence, a very common thing, the possession may remain unchanged in all time to come.” No. In answer to the fact of non-delivery, the mortgagee can be relieved only by making out such a case as establishes his good faith ; and it is difficult to see how a continuance of possession in the mortagor, after all reason for it has ceased to operate, should tend to the establishment of such faith, or leave it to be inferred, any more than omitting an immediate delivery without an original excuse.

But other arguments are adduced. The vessel was owned in common, the Demings residing at Oswego, the other owners at a distance. The previous arrangements for the season had led to the common appointment of a master, who had entered into an engagement to sail the vessel under the direction of the Demings, on joint account. It is difficult to perceive what reasonable obstacle was presented by any of these considerations to the change of possession, so far as the Demings were concerned. Surely one tenant in common may sell and deliver, or relinquish the control of his interest to another, in spite of any objections from his co-tenants. If the master was under contract, the transfer might have been subject to that, or he might have been released or discharged, or his powers revoked, if there were any dissatisfaction with the change. The registry and other papers might have been altered ; and in short the Demings might have given all their control into the hands of Weed and Taurman, the mortgagees. But no attempt was made to do any of these things. How do we know that the Utica owners would have been dissatisfied with the change ? How that the master

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would have been? None of them were ever consulted. The whole argument lies in a possibility coming in by way of after-thought.

Again: it is said the plaintiffs had notice of the lien by mortgage. This is an objection of a very ancient date—one which has been often made, but never without being overruled. The obvious consequence of listening to it would be, to furnish a ready expedient for protection to fraud of *the kind now alleged in all cases. A creditor having notice of a [*124] fraudulent mortgage is a reason why he should bestir himself to avoid it.

We are now told that the plaintiffs conceded the mortgage to have been *bona fide*. If that were indeed so, I admit we could not hold otherwise. But the argument misconstrues the admission. It was, that the debt was due at the time when the mortgage was given, that this was entered into at the solicitation of Weed & Thurman, and that it was duly filed at the clerk's office. When it is established as a legal consequence that a debt actually due, secured by a mortgage given on the creditor's solicitation, and filed, necessarily overcomes all evidence of fraud, or, in other words, that it necessarily cuts off all force from the debtor still holding his property, the argument will be conclusive. But the real debt of a favored creditor, a friend or connection, is known in practice to be a very common instrument of fraud. Why should the debtor still hold on to his property? Doubtless, because it is for his own convenience—probably because the creditor soliciting the preference promises that he will be indulgent to the calls of that convenience; and thus the debtor is still allowed to continue the man of ostensible fortune and business, drawing in the world to credit him. Thus he is enabled to go on, concealing or pocketing his other effects, till his purposes are still farther subserved by winding up his affairs at the convenient season, and defrauding his tens or hundreds, where otherwise he could have deceived nobody. The mortgagee thus makes himself a party to the false pretences or appearances by which frauds may be and commonly are multiplied; and what is the excuse? The debt was a fair one. But the parties fly in the face of the law. They refuse to comply with those forms of business which the law has devised to prevent them from becoming parties to a fraud on their neighbors, and for the more general and enlightened purpose of preventing fraud in general. We have only to ask which is the more important—that the creditor's particular debt shall be saved? or that the world shall be protected by nullifying the act? The law must proceed by *gen- [*125] eral rules. If it allow a non-delivery in one case, it must be allowed in all similar cases. It therefore calls for an open, honest course in all, or gives way only for reasons most strong and satisfactory. It is not the debt which the law condemns for the omission, but the fraudulent means resorted to in obtaining the security. It therefore throws the creditor back

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upon a remedy common to all the creditors. If his debt be valid, he may go on and collect it in a legal way; the law therefore does less here, by way of punishment, than in many other cases of the kind. The presumption is in some cases conclusive. Why are contracts declared void by the statute of frauds and perjuries, when not written, or sustained by part delivery or payment of earnest? Because, if we depart from such means, fraudulent contracts may be pretended and supported by perjury. The law feels its incapacity to reach by direct proof, what in its own nature seeks to conceal its real character; and therefore prescribes as the penalty of omitting certain solemnities or ceremonies which cut off or much diminish the chances to defraud, that the transaction not attended by them shall be void. In default of direct, it goes to circumstantial proof, giving that greater or less effect according to the magnitude of the evil, the temptations to its commission, and the difficulty of detection by direct means. Weed & Thurman seem to have understood this matter perfectly. Their mortgage provides for a change of possession and sale, even before the day of payment, if they should imagine themselves insecure. I collect from this that they knew there was danger of interference by other creditors. They not only cast this anchor to windward, but finally, fearing that all color of claim had gone, they get the Demings to accommodate them with a voluntary judgment and execution, under which, independent of the mortgage, they might, as they do now, contest the validity of Rood's levy and sale to the plaintiff. The debtors, it seems, were at all events to have the use of the vessel, no matter at whose expense, or at what risk, or what rule of law was violated. Being unluckily detected and exposed, they ask protection from the [*126] court on account of the great merit of their debt. "They may be and doubtless are, in general, very fair men. But as such, they should be the last to desire that a wound may be inflicted upon the law, which they may be the next to feel in their own persons.

It is insisted that this mortgage is within the 7th section, 2 *R. S.* 70, 2d ed. concerning bottomry, &c., which declares, that "nothing contained in the two previous sections (the 5th and 6th,) shall be construed to apply to contracts of bottomry or respondentia, nor to assignments or hypothecations of vessels or goods at sea, or in foreign ports."

First, is this a bottomry contract? Bottomry is generally defined in the English books as in 2 *Black. Comm.* 457. He says it is in the nature of a mortgage of a ship. It is when the owner takes up money to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as security for the repayment. In which case, it is understood, that if the ship be lost, the lender loses also his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. This defini-

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tion, it will be perceived, contemplates taking up money, on some specific voyage or adventure which may be at more than 7 per cent. interest, because the loan is gone if the vessel be lost. It is a contract of hazard. No transaction or stipulation of that kind appears between the Demings and their mortgagees. The security was given for a precedent debt, and the contract would have been vitiated by an usurious rate of interest. Other points of distinction between bottomry and mortgage are, that under the former, if the vessel be not exposed to the perils of the sea, in other words, if the risk be not incurred, no contract arises. *Emerigon on Mar. Loans*, § 2, Am. ed. 1811, p. 32. *Id.* p. 34, 38. It is a gaming contract. *Id.* p. 33, 38. It has a character and qualities peculiar to itself. It is different from all other contracts, and forms one of a particular kind. *Id.* 31. It loses its character entirely when the money secured by bottomry was originally advanced on the personal credit of the owner; and the bottomry bond, or rather what professes to be such, is "afterwards [*127] taken. That is abundantly settled by express adjudication, in the English courts of admiralty, *The Augusta*, 1 *Dodson*, 287; *The Hero*, 2 *id.* 139, 146, 7, and in our own. *The Hunter*, *Ware's R.* 253, 4, 5, and the cases there cited, viz. *Liebart v. The Emperor*, *Bee's R.* 337. *Sloan v. Ship A. E. I.*, *id.* 250. *Rucker v. Conyngham*, 2 *Pet. Adm. R.* 295, 300. *The Aurora*, 1 *Wheat.* 96. These decisions, it is true, were made in respect to bottomry bonds given by the master. But I apprehend it is so in all cases of bottomry, proper, whether the lien were created by the owner or master. If it be to secure a precedent debt, it comes to the case of a common pledge or mortgage, according to the form of the contract. Beside, the contract is entirely of a nautical character. "The distinction is great," says Molloy, "between money lent to be used in commerce at land, and that which is advanced to sea." 2 *Moll. De Jur. Mar. B.* 2, ch. 11, § 8. He adds, as to the latter, "the same is advanced on the hazard of the lender, to carry, as is supposed, over sea. Hence it is technically called *pecunia trajectitia*; and in respect to the great premium allowed, *usura maratima* or *fœnus nauticum*. *Id.*, *Emerig. edition before cited*, p. 18, ch. 1, § 1. The form of a bottomry bill by owner and master is given in *Beawes*, 139, *Dubl. ed.* 1795, and will be found there characterized by all the distinctions I have mentioned. The occasions of the particular voyage are made the ground of the loan, and the risk is as closely tied up to the voyage or adventure itself, as it is in a marine policy of insurance. It may be on time; but that makes an exception to the general rule. *The Draco*, 2 *Sumn.* 157. In the case at bar, the security was taken for a precedent debt between landsmen, in respect to a land transaction. The reason of the contract is limited to voyages on the ocean or its great navigable arms, in the prosecution of which the merchant often incurs extraordinary risks. Applied to

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our inland waters, it would open a wide door to the practice of usury. A lake is no more than the expansion of some river or creek. If allowed on Lake Ontario, we may next hear of bottomry on Durham boats [*128] between that and Montreal, which, in their "way cross a wide place of the river St. Lawrence, called Lake St. Francois. But here the perils are not near so great as in the rapids of the same river. Hence the transition will be easy to our rivers, to our smaller lakes, and thence to the canals. In that way we might certainly relieve our courts of common law by a division of labor between them and the admiralty ; for another peculiarity of all nautical contracts, either of express or implied lien, is that cognizance of them, exclusive or concurrent, belongs to our courts of admiralty. Would that court, sitting in our northern district, have tried this question ? Had the mortgagees gone there, I apprehend they would have been told at once, that the court was limited to matters at sea, while other magistrates had exclusive jurisdiction of like matters on land. *Dunl. Adm. Pr.* 6.

The clear principle of the 7th section is, that in bottomry, the loan being usually, if not always, made for the purpose of enabling the borrower to prosecute some maritime adventure of his own with the aid of the very ship which is put under pledge, the nature and object of the transaction thus implies that the pledgor should keep possession. Indeed, his possession is an element without which the contract loses its distinctive character. And it being quite useful, not to say essential, to the exigencies of foreign commerce, though much less common than formerly, *vide McCulloch's Com. Dict. Bottomry*, it was feared, I think without reason, that the 5th section, though it merely fixed the conditions on which chattel mortgages could be taken, might be construed to interfere with bottomry. Thus the statute might have repealed an important branch in the system of protection accorded by our laws to trade upon the high seas. How little danger of this there was, however, may be inferred from *The Draco*, 2 *Sumn.* 157, which held that a statute requiring the registration of personal mortgages, though without exception, did not extend to a bottomry bond.

The view we have thus taken of the attempt to make bottomry out of the mortgage in question, will enable us to appreciate the objection, [*129] that, if not bottomry, it comes "within some other term of exception in the 7th section. That it is touched by the word *respondentia* is not pretended, that signifying a pledge of the cargo, or goods to be transported. 2 *Black. Comm.* 458. It is the same to the cargo as bottomry to the ship. *McCulloch's Com. Dict. Bottomry*. The principle of the exception will here, therefore, be found exactly identical with that which saves bottomry. The goods must remain with the pledgor ; and see *per Story*, J. *Conard v. The Atlantic Ins. Co.* 1 *Pet.* 436, 7. The last exception in the section is of assignments or hypothecations of vessels or goods at

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sea, or in *foreign ports*. These words undoubtedly extend to all assignments and all hypothecations conventional or implied either of vessels or cargo, whether by the act of master or owner. Hypothecation, when applied to maritime transactions, is perhaps about the same with bottomry or respondentia, though it is usually predicated of a loan by the master on the vessel; freight, or cargo, made in order to raise money for the necessities of the voyage. *Vid. Abb. on Ship.* pt. 2, ch. 3, § 15, 29. In a more general sense, it is a pledge to secure any debt or engagement, without a delivery or possession. *Story on Bailm.* ch. 5, § 286, p. 196 of 1st ed. It is often confounded with pledge or *pignus*. *Id.* That either term used in the section would extend to mortgages proper, may admit of much doubt. *Vid. per Story, J. in Conard v. The Atlantic Ins. Co.* 1 Pet. S. C. R. 441. But whatever be the abstract nature of the contracts mentioned in the latter part of the section, a decisive distinction is, that the vessel or goods must be *at sea* or in a *foreign port*. All the contracts intended by the section are of the nautical class. They regard adventures upon the highway of nations, where ship or goods may be long absent, or at great distances in foreign ports. Our western lakes, it is true, are sometimes by a strong figure of speech, called *seas*, more usually *inland seas*; but no one so speaks or writes of them, when pretending to exactness of expression. Thus the principle of the exception is made to operate uniformly, as it was no doubt intended to do; not on vessels or goods upon lake and river voyages, which are performed like those of the vessel in question; *an outward and [*130] homeward trip in a week or fortnight; not on vessels or goods in a foreign port like St. Johns, foreign in a political sense merely, but reached by lake navigation in a few hours after leaving some port near the state line; but some foreign *sea port*, where the article mortgaged is, in good faith, beyond the power of immediate delivery. We have already conceded the extent of the qualification implied in respect to short voyages between neighboring ports, by the very section which requires immediate delivery. We have admitted that the want of such delivery does not detract from the idea of good faith, provided the change of possession be instantly made on the return of the article. The ground of exception was well considered by Story, J. in *Conard v. The Atlantic Ins. Co.* 1 Pet. S. C. R. 449, and applied to an absolute assignment of goods at sea. The excuse was allowed because they were delivered as soon as they arrived home. We doubt whether anything more can be allowed either in virtue of the 5th or 7th sections. The principle is, *lex non cogit impossibilia*. The ship or goods are afloat, or far abroad; not capable of manual tradition. But where the requisite act can not be literally performed, the parties must supply the defect at the earliest opportunity. The delivery must be made when it becomes practicable. Otherwise the exception is at once seized on and abused as a pretence for evading any

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change of possession whatever. No court, in justice to the law or to its own conscience, can at this day, I think, allow that multiplication of arbitrary and unnecessary exceptions by which the rule requiring a change of possession was once almost extirpated. I attempted to collect these exceptions in a note to my report of *Bissel v. Hopkins*, 8 *Cowen*, 166 ; in other words, to embody the principal authorities, English and American, as they stood at the time, by which the rule had been enfeebled ; and since that attempt has been approved as successful by Story, J. *Conard v. The Atlantic Ins. Co.* 1 *Pet. S. C. R.* 449, I may here venture to repeat the question I there asked : “What is the rule worth ? What does it amount to ? Does its preservation merit a struggle ?” The doubt I still think was properly started.

[*131] *But the legislature did not despair, though they found the power of our judicial sentinels paralyzed, and corruption gradually pervading the entire mass of chattel securities. They made non-delivery conclusive evidence of fraud in such securities, unless good faith can be established by the person claiming under it. Was this great act of moral legislation intended to be left open by its proviso to the same race of exceptions, which had come near making its principle entirely barren ? Was it intended that colorable excuses should be submitted to juries as evidentiary of *bona fides*, under the guidance of arbitrary judicial discretion ? Any thing and every thing being thus submitted by the insolvent debtor and his friend, what is real or fabricated, the weak parts of their case suppressed, and the whole colored by glosses, warped by chicanery, and perhaps tainted by perjury, was it intended that this jumbled mockery should go to the jury under pretence of the case being a hard one, and conclusively disposed of by them ? Or does the statute 2 *R. S.* 72, 2d ed. § 4, when it declares fraudulent intent to be a question of fact, leave it to be tried like other causes of intent, on facts pertinent, in the opinion of the judge, according to the general rules of evidence ? We have heretofore given one uniform answer to this inquiry. We have withheld the question of *bona fides* from the jury when the parties have refused to change the possession, if change were within their power. We have considered delivery as the form put forward by the statute to test the honesty of the transaction ; and that the allowance of one evasive excuse after another, is but submitting to have the courts of justice and juries imposed upon by pretences readily devised and eagerly raised.

I have already adverted to the essential importance of certain forms, as measures of protection against fraud. A few remarks more shall close all I have to say in respect to the general points of defence. They all come down to excuses which are not founded in any real necessity. They insist that excuses arising from the convenience of the parties concerned, or the conveniences or purposes of business, should be allowed. They mean in [*132] principle, therefore, that any excuse which the parties “interest-

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ed chose to manufacture, and call such, must go to the jury and be finally passed on by them, as relevant proof of *bona fides*. It would be enough, I admit, to say that such points have been overruled again and again, both in this court and the court of chancery. But there is a constant press upon the courts by creditors, and especially by debtors, to obtain such a relaxation as shall allow men to place the title of their goods and chattels in one hand, while the possession is in another. The answer of the courts has been, that such a posture of things is false, and unavoidably imposes upon the world. The rule of evidence is, that a man shall be holden to intend the inevitable, indeed the natural or probable consequences of his own act; and shall not be allowed to escape from the intendment until he excuses the being a party to the imposition, by the necessity of the case, such as the impossibility of keeping the title and possession together. A contrary course has been found to result in extensive moral debasement, and led to legislative interposition. The statute was holy, and calls for a ceremony of little trouble in order to fulfil the purpose. Change the possession. That puts the world on inquiry, and they learn how to act with safety. Then if the consideration be not impeached, nor the transaction otherwise shown to be unfair, both parties must be deemed honest as between themselves, in respect to creditors, and the world at large. The *onus probandi* is thrown by the forms of business on the persons who come to impeach the sale or mortgage. If those forms be not complied with, if possession be not delivered, the *onus* lies on the side of the person to whom the assignment or mortgage is made. He must then, the statute says, prove that it was made *in good faith*, and *without the intent to defraud*; which question of *good faith* or *intent* is a question of fact for the *jury*. That *such is the question to be tried*, and that *such is the power of the jury*, no judge ever doubted. It has been supposed by some that this power has been denied by this court. This is not so. The rule here is no way distinguishable from that laid down by Senator Dickinson, in the late case of *Stoddard v. *Butler*, 20 Wend. 543. "While it is cer- [*133] tain that the question of fraudulent intent is *one of law*, while the vendor retains possession, and *no explanation* is offered; it is equally clear that the question of intent, when *an explanation* is offered, is a question of fact. The former is the *prerogative of the court*, and the latter of the *jury*. It is only necessary for the person claiming under such sale to shew, "*that the same was made in good faith, upon sufficient consideration, and without any intent to defraud*; and of the intent and *good faith* the *jury* are the exclusive judges." This rule I admit extends to *all cases*. I take these as the strongest expressions of the strongest opinion that has or *probably* will be delivered in favor of the power of the *jury*; and I adopt those expressions in their broadest extent. All they assert is that the *quo animo* is a question of *fact for the jury*, when *an explanation* is offered: that is, as I understand

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the phrase, not anything and everything which may be called an explanation ; but evidence *pertinent to the question of fact*. It stands on the footing of any other *question of fact to be determined by the jury*. If the *testimony offered* be pertinent in the opinion of the judge, it is his duty to receive it ; if not, he is bound to reject it. This is a universal rule in relation to trying all questions of fact, which still separates the province of the judge from the jury. It was not denied by the learned senator ; and is as well established as any distinction in the law. Mr. Phillipps in his Treatise on Evidence, the last (8th Lond.) ed., p. 2, makes these remarks : “The parties to a suit are not permitted to adduce every description of evidence which, according to their own notions, may be supposed to elucidate the matter in dispute.” Again : “It is the province of the judge presiding at the trial to decide *all questions* on the *admissibility of evidence*.” In *Cowen & Hill's Notes to 1 Phil Ev.* p. 428, note 326, there are several cases cited to enforce and illustrate the following proposition : “The court always protect the jury from irrelevant testimony, by excluding it on objection in the same manner as they shut out other incompetent proof.” For instance, after the fraud is shown by the

fact of the vendor retaining possession, the jury might desire to [*134] hear “evidence of the general and moral character of both parties to the bill of sale, saying, if that character be good, it would authorize them to infer that the parties did not mean to act dishonestly. Yet no court, in the present state of the law, would allow such evidence. *Gough v. St. John*, 16 *Wendell*, 646, 653, 654, and the cases there cited ; and vide 1 *Phill. Ev.* ed. by *Cowen & Hill*, p. 176 of the text, and p. 456 of the notes, and the cases there cited. I put this as one example among many to show the exact difference which I presume my brother Dickinson intended to make between himself and the supreme court. It arises upon the competency of evidence, not the sufficiency, and I agree with him again, when he says, p. 514, the statute has given us no power to determine *what particular facts shall or shall not be sufficient evidence of honest intention*. The statute says nothing one way or the other, as to what facts shall *persuade* or what shall be *pertinent*. For all this, the judge is left to the common law. The whole then comes down to the question of what testimony is *admissible*. Was it *admissible* in *Doane v. Eddy*, 16 *Wendell*, 522, to prove the debt a fair one, and that Doane wanted possession for the purposes of his business ? We held not, because the cases had always, at least a large majority of them, held such proof to come entirely short of rebutting the strong presumption of fraud arising from the possession not being changed. The statute declaring that from possession you shall infer fraudulent intent, the law has been settled for 200 years that a good consideration is no answer. *Roberts on Fraudulent Conv.* 548, ed. of 1800, deduces the following rule from *Twyne's case*, decided in the reign of Elizabeth : “Evi-

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dence of the fraudulent intent *supersedes the whole inquiry into the consideration*; for no merit in any of the parties to a transaction can save it, if it *carries intrinsically, or extrinsically* the plain characters of fraud." That is the common law to this day. The statute does not deny it. No case ever held the contrary. The rule was again followed in *Randall v. Cook*, 17 *Wendell*, 54. So far we have one zero. Need I say that if the fact or facts proposed in proof as an answer to the presumption amount to nothing, they "are not admissible; in other words they are in- [*185] competent, and as such the judge is bound to exclude them, or tell the jury they are nothing; and if they find against his direction, then to grant a new trial ? This is the law of all cases, either where improper evidence is received, or the jury find against its weight. It is so whether the intent be declared a question of fact for the jury by common law or statute. The words *questions of fact for the jury*, are not new; they may apply to every possible issue, according to the nature of the evidence; and they may not apply at all. If the evidence be such as to leave a question open for the jury, they must decide; otherwise not. If they have a right to say that, because I have a debt against A., I may take his bill of sale or mortgage of personal property, and still leave him in the use of it, without being subjected to the presumption of frauds as against his other creditors, then the rule of this court is wrong. But to say that a jury may decide as they please, for or against the weight of evidence, is too strong at this day in respect to any question of fact. Every experienced judge knows, that a real debt of some amount is usually resorted to and wielded as the most deadly instrument of fraud. The practice of which I am speaking is usually called among the people at large *covering property*. A friendly creditor is commonly resorted to, because he holds a debt which will make the *best cover*. Leaving such of the insolvent debtor's property as is exempt by statute from execution—a cow, sheep, hogs, furniture, &c. the debt is used to *cover* all the rest. If it be not and cannot be made quite large enough, there are generally some articles which can be elogned or concealed, money, choses in action, and other light small portable things. The latter are frequently taken away by connections or intimate friends with the assent or connivance of the debtor. He is thus apparently stripped, reduced to such appearance of beggary as will excite sympathy in the breasts of a humane jury, and then produced as a witness on the stand to prove the covering debt is a fair one, &c. He can always be made a competent witness by a release, and is generally so without one. As the transaction is for his benefit, there is great danger that he "may perjure himself. He is sure [*186] to make the debt as large as his conscience will allow. He generalizes. He remembers debits, but forgets credits, insomuch that the very persons he is struggling to defraud, are often deceived into a belief that the

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debt is much larger than it really is. Transactions like this, are so common that a judge knows them at a glance ; and I remember few instances wherein a jury has failed, under his direction, to stamp the retaining of possession with reprobation, as leading to an inference that the transaction was attended with the usual circumstances of corruption, or others newly devised. Debts are sometimes created by a collusive trial and recovery, or a collusive arbitration, in which the debtor and his friendly creditor agree to appear as angry and adverse litigants. In short they have the whole field of device and imposition to themselves ; and they generally succeed partially or wholly, unless the defrauded creditors are allowed to insist on the continuing possession as a reply to the glossings and colorings of the transaction. Previous to the statute putting mortgages on the same footing with bills of sale, (which statute was intended to repeal the decision in *Bissell v. Hopkins*, 3 *Cowen*, 166,) the fraudulent parties were almost sure to succeed by putting the transaction in the form of a mortgage. But in *Doane v. Eddy*, there was added *charity, brotherly affection, and gospel purposes*. We have all heard of *pious frauds* ; and I shall presently examine the value of that charity which covers a brother's or a neighbor's property against his creditors. At present I will only say *mene tekel, &c.* and set it down as another *zero* in the chain of proof offered by way of explanation. The principle has, therefore, obtained an almost universal footing that the mere proof of a debt, to whatever amount, shall not be allowed to excuse the continuance of possession ; and that it cannot be so regarded by a jury, however necessary the use of the property may be for the debtor. These two circumstances prove nothing of themselves. They do not make an *explanation*, nor can the jury regard them as sufficient to overturn the presumption of fraud, derivable from the possession of the debtor. They are not pertinent evidence [*187] for that purpose, unless you go farther, or at least propose to go farther, and show that the articles were of such a nature, or so situated at the time that the possession could not be changed ; and that as soon as it could, the change was effected. There is not a doubt that the present statute intended to enact the principle of *Edwards v. Harben*, 2 *T. R.* 587, extending that principle both to bills of sale and mortgages. That is the principle held by a majority of this court in *Doane v. Eddy*. We certainly preferred that the reverend gentleman should in that case rather give up his horse to his creditors, than ourselves to give up what we thought an important general principle of evidence. I understood my brother Dickinson, with whom I was associated in deciding *Stoddard v. Butler*, to feel hurt by our decision in that case. For it, I am deeply responsible, and should regret its being wrong. I decided it at the circuit on a principle which I have uniformly acted upon for many years ; and which I believed to be as old as the statute of Elizabeth. I would not have allowed a market-

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man or a farmer thus to keep his horse from his creditors for business purposes ; and I could not distinguish the principle in those cases from that of the clergyman, though respectable, as I knew him to be by reputation. It was no more than possession for the purpose of his professional business. Though that was holy, the principle was of the same character, and it was better, I thought, for him to borrow another horse, or even to do without one, than by relaxing a healthy moral and legal rule open the flood-gates of general corruption. My learned brother remarked, in *Stoddard v. Butler*, that “neither the legal nor the moral code should be administered for the sole benefit of creditors,” p. 541 ; and by what follows, I infer he is in favor of the system of leaving property sold or mortgaged in the hands of insolvent debtors. I can only answer that here, if the debtor be honest, the code does, in the very nature of the question, respect creditors alone. It lies exclusively between them. It is not material to the debtor which of them has the property, any farther than as one may be a more useful instrument than the other towards enabling him “to keep that which his [*188] creditors are entitled to ; not only in nominal right, but actual possession. Senator Dickinson supposes that this is to *trample on the ordinary charities of life*, that it ministers to the *mercenary passions* at the expense of the benevolent affections. With deference, I have always thought of this matter in a different light. I have considered it the paramount duty of an insolvent debtor, and an insolvent is always poor, to surrender the possession of his property for the payment of his debts. If compelling this, ought to be repudiated as ministering to the *mercenary passions*, and violating the *charities of life*, then the legislature ought to pass a law exempting all property, as well as body, from arrest. It seems to me, we have no right short of that, to adopt a *system of charity* which shall require creditors to forbear the only means left to collect their debts. Beside, I have already ventured to suggest, and endeavored partly to show, what sort of charity such a principle produces. It is ordinarily but another name for fraud, sometimes mixed with perjury.

Another learned senator, brother Verplanck, who also sat with us in *Stoddard v. Butler*, and whose opinions are always heard and read with pleasure and edification, amplified the principle of evidence. At page 551, he says, “If then there be *positive* evidence of a *fair and full consideration* paid, of the existence of *reasonable motives* for not requiring delivery, such as *may and do sway honest men*—for instance, *filial, or parental or brotherly affection*, or the *convenience and usages of business*, together with that *publicity* which excludes the idea of intended evasion of law, or holding out false credit, all the requisites of the statute seem to me to be fully complied with, in the strictest agreement with its *letter* and in perfect conformity with its *spirit, intention and policy*.” The letter of the statute is very general, and

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accordingly all the circumstances of conformity with it are properly put forward by the learned senator as matter which appeared to his mind constructively not only *competent* but *sufficient* evidence to overcome the presumption of fraud.

I have already considered the force of the positive evidence usually called in to show a full consideration. [*139]

appearance of reasonable motives, &c. such as *may and do sway honest men*, are of easy devise, and there are hardly any which may not be devised, and urged upon a jury with plausibility. The example put, of the convenience and usages of business, is extremely comprehensive, and if adopted will be rapidly extended by the secret management of insolvent debtors and their friendly and select creditors, real or feigned, to all bills of sale and all mortgages. With deference, it seems to me that the allowance of this example alone would operate as a virtual repeal of the statute. The other examples, too, of filial, parental or brotherly affection, may be easily expanded into the same consequence. It is confined in the expression to near connexions. The practices of such in the covering of property have already been greatly complained of. Judges on the circuit have seen such charity overflow when the creditors of a poor friend are kept at bay. But the circle cannot be thus confined. It is not that sort of cold charity which requires a spur from the preacher of morality. It is an active charity running ahead of the sheriff and his execution, though he be urged forward by creditors, themselves actuated by all the power of the mercenary passions. It cannot be restricted to a father, a son, or a brother who happens to be a creditor. The principle lies in supposed friendship or affection; it may, therefore, easily be extended to general charity, as put by my brother Dickinson, and thus be made as broad as the conveniences or usages of business. It may appear at first to be the mere dropping of a pebble in the lake; but,

“ The center moved, a circle straight succeeds,
“ Another still and still another spreads;
“ Friends, parents, kindred, first it will embrace,
“ The county next.”

The objection is, in short, that when the conveniences and usages of business, and of charity to debtors are recognized as within the range of evidence proper to submit to a jury, they to be told that either of these may be allowed as an answer to the presumption, every fraudulent transfer will be clothed with the concocted appearance of one or the other, to be, if necessary, sustained by perjury. Accordingly the disallowance of such evidence has, to most judges, seemed necessary. There is, I admit, one English case where the principle of charity was allowed: *Kidd v. Rawlinson*, 2 Bos. & Pull. 59. The debtor's brother-in-law purchased in his goods under an execution, paid the money and allowed them to remain

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with the debtor. Yet the court agreed that, had the purchaser been a creditor or conventional assignee, he could not have maintained his purchase, however fair the consideration might have been. In *Edwards v. Harben*, there was a full consideration. Now the charity in *Kidd v. Rawlinson* is claimed as a protection in relations from which the very case professed to withhold it. It was claimed in *Doane v. Eddy*, in *Stoddard v. Butler*; at the circuit, it is a matter of course to claim it as a protection for almost every fraudulent sale. It comes for a creditor who has got a bill of sale or mortgage. He *alone* is then charitable. Those creditors who oppose him are *mercenary*; and he runs to stop their execution and save the debtor from oppression. Charity is indeed among the most lovely of the social virtues; but is there any treatise on ethics which enrols such a case as coming within its territory? It is not now necessary to say whether *Kidd v. Rawlinson* can with safety be received as the law of any case; but it seems to me entirely clear that if maintainable at all, the principle cannot be extended. That case was once recognized by this court, in its restricted application, *M'Intyre v. Tanner*, 9 Johns. R. 135, 6. The consequence was that the most important charities of the kind in question were exercised by a purchase at sheriff's sale, the debtor himself often secretly furnishing the money by which it was carried on. Evidence easily manufactured is deceptive in its own nature. It is, like the declarations of a party in his own favor. Parties may make a *debt*, parties may make *convenience* and *usage of business*, parties may create appearances of *poverty*, of *beggary*, and *charity*, and if these pass for evidence, they will be all simulated. They should be rejected on the same principle which excludes the declarations mentioned. It still appears to me, therefore, with great deference, that the rule established in this court and in the court of chancery, and certainly not as yet shaken by any judicial decision of the court of errors, *is sustained both by reason and authority. [*141]

If Rood was to be believed, no serious question can be made that the levy was complete. There was an actual entry, the vessel being in the sheriff's power, and notice to the defendants in the execution. These acts were never doubted to be sufficient. No formal inventory is necessary. *Haggerly v. Wilber*, 16 Johns. R. 287. *Wood v. Vanarsdale*, 3 Rawle, 401, 405, 6. That the witness was not worthy of confidence it is impossible for us to pronounce, since his credibility has been sanctioned by the jury under a proper charge from the court.

The sale took the usual course of one where the debtor has, in conjunction with some friend, been tampering with the title. The deputy sold the right of the Demings. What was that? The mortgage being void for fraud,

* See *Smith & Hos v. Acker*, 23 Wendell, 653, decided subsequent to this case, although reported previously.

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as against the bank and all persons purchasing under their execution. The right of the Demings was perfect in one undivided unincumbered half of the vessel. The deputy said he would sell that right, and let the purchaser fight it out. Yet the smallness of the sum bid is relied on as a case of inadequacy which, *per se*, should vitiate the sale, or at least raise the inference that the plaintiff meant to purchase subject to the mortgage. He knew that he must do so subject to a pretended mortgage, and had notice, at the time, in the phrase of the sheriff, that he must fight for whatever he got. The smallness of the consideration may thus be accounted for upon grounds far other than any intent to admit the validity of the mortgage. The defendants here are indebted to the acts of the mortgagors and mortgagees, for the smallness of the bid. It arose from the cloud which their manner of doing business had brought upon the title.

It is said the inference that the plaintiff intended to purchase an equity of redemption merely, is strengthened by the late statute. 2 R. S. 290, 2d ed. § 20. That section declares that when goods or chattels shall be

[*142] pledged, the right and interest of the pledgor may be sold on execution, and that the purchaser may take possession on complying with the terms and condition of the pledge.

The reasoning is this : as there were two intents open to the plaintiff, one to purchase absolutely, the other subject to the mortgage, it should rather be intended, considering especially the notice of the mortgage given, and the smallness of the bid, that the latter intention was the true one. The reasoning would be strong, upon two suppositions : first, if the defendants' counsel construe the 20th section rightly ; and secondly, if the mortgage had been really valid in respect to creditors. White, the plaintiff, might then have said in an action against him, " As between a lawful and unlawful intent, I claim that the former shall be presumed ;" and he could certainly have no objection that the rule of presumption should apply here. Even then, however, it might be overcome, and would be clearly overcome by the evidence here that he acted in the purchase adversely to all claim of the mortgagees ; and all possible doubt is dissipated, when the mortgage is found to be fraudulent.

Beside it is by no means clear that the word *pledge*, the only word used in the 20th section, when applied to goods and chattels, comprehends a *mortgage*, though it may when applied to real estate. 2 Black. Comm. 157. In the latter case, however, the equity of redemption, according to the doctrine of this court, is the subject of sale independent of any statute. *Waters v. Stewart*, 1 Caines' Cas. Err. 47. A *pledge*, taken in its strict sense as applied to chattels, is a bailment, that is, an actual delivery of the thing, for the security of some engagement. But by a grant or conveyance of goods in gage or *mortgage*, the whole legal title passes conditionally to the mortga-

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gee. The distinction is very exactly shown in *Story on Bailm.* ch. 5, § 286 and 287, 1st ed. p. 196 ; and is quite familiar to the profession. That the statute means a *pledge* in its strict sense is rather inferrible too, if there were otherwise any doubt, by the manner in which it speaks of the purchaser taking possession on complying with the terms and conditions of the *pledge*. The words are hardly applicable, in their general sense, to a case where the whole title has passed conditionally, and where, as is well understood, it becomes absolute "on default of payment at [*143] the day. *Patchin v. Pierce*, 12 Wendell, 61. Clearly, after the title becomes absolute, the statute cannot divest it. *See per Story, J. in Conard v. The Atlantic Ins. Co.* 1 Pet. S. C. Rep. 441. I admit the idea has been started that there is still an equity of redemption remaining, which may be enforced in chancery. *Story on Bailm. ut supra*, § 287. 1 Pet. *ut supra*, 441 ; and this was strongly favored by the remarks of Mr. Justice Nelson in *Patchin v. Pierce*. We are, however, sitting in a court of law ; and such an equity had never before the statute, nor has it since that I am aware, been helden tangible by legal execution. In the case before us, when Rood came to sell, the mortgage had long since been forfeited ; and, if good against creditors, the title was absolute in the mortgagees.

The only remaining question respects the competency of W. F. Deming, one of the mortgagors. He was offered as a witness for the defendants, but was rejected by the judge as interested to testify in their favor.

Under the peculiar circumstances of this case, he was, we think, clearly incompetent, for the reason which governed the learned judge in excluding him. If the defendants maintain their position, that makes the vessel and furniture worth about \$2000 to the witness by way of discharging his debt due to Weed and Thurman. If the credit of that sum be displaced, then the same property cannot avail him more than *three dollars*, and both he and his mortgage creditors were privy to the concourse of circumstances from which his interest arose. It is supposed that as between him and the mortgagees, the credit is conclusive. If that were so, I admit his interest would lay the other way, and he would be technically competent. But we think that the mortgage failing to hold, the credit arising under that may be withdrawn, the same as it may confessedly be in respect to the execution. Had the mortgage itself been given and accepted as an absolute payment for the \$2000 ; had so much of the debt then been extinguished by the joint agreement of the parties, though the act were fraudulent ; yet the law would never allow the credit to be disturbed as "between [*144] them. It would not interfere as between them, to disturb any contract completely executed. It will insist on holding parties to the position in which they have fraudulently placed themselves. So far as the contract, or any part of it, remains executory, it will not be enforced. Nel-

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lis v. Clark, 20 Wendell, 24. Here, it is true, the conditional title passed; but it was merely by way of collateral security. The security could not operate as payment, except by a future sale, under a power contained in the mortgage or implied by law. In this respect the contract was executory; and being fraudulent, it was void *ab initio*. The subsequent sale was not available for any purpose. I do not deny that it might have even operated as a binding payment, had other creditors been kept out of the way; but before the mortgagees had touched the vessel under the power, the bank was in motion, and Rood had levied. It is true the mortgagees then took the alarm, and in December, after the schooner had frozen up, took a formal delivery from the Demings, removed the tackle and obtained their judgment bond. But before this demonstration all their right had gone; the schooner was in the custody of the law; and both the Demings and their mortgage creditors were trespassers against the sheriff. He went on, and previous to any sale by the mortgagees, or application of the proceeds in payment, had swept away every vestige of title by the auction sale to White, the now plaintiff. In truth, the mortgagees never took a single step valid even as between them and the Demings, after the mortgage had been executed. Neither the one nor the other could interfere or bring any action in respect to the vessel. The law had taken it away from both, under execution against the Demings. Had the mortgagees been allowed by the bank to proceed and make a sale, and endorse the \$2000 as a credit, under the power derived from the Demings, I do not deny that the law would hold them to a consummation in which they might both be said to have participated. But

the matter never having gone beyond the execution of the collateral security; that proving in fact unavailable, by the vessel being taken away, before the mortgagees began to "execute the power, it was nullified to all intents and purposes. The credit was given without the poor sanction even of a fraudulent authority. The very next moment after the delivery in December, the sheriff might rightfully have ousted them by recaption or writ of replevin. Before the levy, they might have taken possession, or brought trover against the Demings, for the law will follow by remedies the notion of an executed contract. The fraudulent alienee of land may bring ejectment against the alienor, and the fraudulent vendee or mortgagee of goods may have trover against the vendor. *Vid. per Nelson, Ch. J. in Nellis v. Clark*, 20 Wendell, 39. But the mortgage, though an executed contract as to the title, was executory as to payment. That consequence was to grow in future out of a remedy by possession and foreclosure or sale. Neither of these was ever executed. Assuming what the argument for Deming's competency must assume, that the adverse claim of the bank was valid, and rightfully enforced by the levy, the execution of the power thus being stopped midway, the credit of \$2000 becomes lost to

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the witness. It is no more in legal effect, than if he had turned out an unavailable chose in action, as a collateral security. A recovery by the plaintiff here is equivalent to an eviction of the mortgagees, and would, therefore, be evidence against the witness in any defence he might set up, founded on payment by the mortgage sale. The balance of interest in favor of the defendants, thus stood as \$2000 to \$3.

The result is, that a new trial must be denied.

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Where a testator gives a farm to his son in fee, *upon condition* among other things that his daughters shall have the use and occupation of a room in his dwelling house, and be provided with food, raiment and fuel as long as they remain unmarried, and there be a *breach of condition*, an action of ejectment lies by the daughters for the recovery of the shares of the farm to which they would have been entitled as the children of their father.

Such condition is annexed to the estate, and binds the land, in whose hands soever it may be. To work a *forfeiture* of the estate in such case, there must be something more than a *mere denial of the right*; there must be some *act* done, as *shutting up the house, &c.* Great strictness is required where the forfeiture of an estate is sought.

THIS was an action of *ejectment*, tried at the Columbia circuit in April, 1839, before the Hon. JOHN P. CUSHMAN, one of the circuit judges.

The plaintiff, Gertrude Hogeboom, as one of six children and heirs at law of *Johannes Hogeboom*, who died about the year 1814, seized of a large farm, of which the premises in question are a part, claimed to recover an undivided sixth part of the farm. The father of the plaintiff left a will, by which, among other things, he devised all his *real estate* to his wife Gertrude as long as she should remain his widow; and after the death or marriage of his wife he gave and devised unto his son *Stephen*, *in fee*, all his real estate, “*upon condition, and with the proviso and restrictions* that he pays so much of *honest debts*, and *funeral charges*, and pays the *legacies and supports my daughters Gertrude and Helen as is hereinafter mentioned.*” He then gave several legacies; and in relation to his daughters *Gertrude* and *Helen*, he provided as follows: “I direct that [after the death of my wife] they shall reside with the family of my son *Stephen*, or have the use and occupation of my east upper room, as they choose: and I direct that son *Stephen*, his heirs, executors or administrators support them with good victuals, drink and every day apparel, and provide them with sufficient fire wood, ready cut to put on the fire, as long as they remain in the situation above mentioned, [unmarried.] And in case *any dispute shall arise between them concerning their support*, and as often as it may arise, it is my desire that two or more disinterested persons be appointed by the surrogate of the county of Colum-

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bis to enquire into the matter, and if in their opinion, or in the opinion of two of them, that they are not supported or provided for as before directed, then and in such case it is my desire that the persons thus chosen or appointed, or any two of them, award, order and determine in what manner particularly they shall be maintained and supported by and at the expense of my said son; and such award, order and determination, made in writing, shall be binding and conclusive: and the expenses attending such appointment and determination shall be paid, the one half by my son Stephen, his executors or administrators, and the other half my daughters Helen and Gertrude."

The widow of the testator survived him several years, but the time of her death does not appear. *Stephen* occupied the farm after his father's death, until his own death in March, 1834. He left a will, by which his executors were empowered to sell the farm; and on the 1st April, 1835, they sold and conveyed it to *John L. Hogeboom*, who, on the 1st April, 1836, sold and conveyed the farm in two separate parcels—one part to *Thomas F. Mesick*—and the other part, being the premises in question, to the defendant—with covenants of warranty. The mansion house in which *Johannes* lived was on that part now owned by *Mesick*. It was re-built prior to 1834.

Stephen Hogeboom paid the testator's debts and funeral charges, and the legacies given by the will of *Johannes*. After her father's death, the plaintiff lived in the family of Stephen, and was supported by him, until about the year 1828, when she and her sister Helen purchased real estate in Montgomery county, where they had friends, and went there to live, with the intention of residing there permanently. They have lived there ever since, with the exception of two or three visits to Stephen. One of those visits ended in February, 1826. They came again to Stephen's in 1829 or 1830, and

stayed a year, and in October returned to Montgomery. They [*148] came again on a visit in the fall of *1833, and stayed until June following, eight months, when they left. Some time before they left, Stephen told them, if they called it a visit, he thought they had stayed about long enough; he said, he thought they had no right there, because they had gone away of their own accord, and had long ago lost all claim under the will. They left about two weeks after this conversation. This was after the death of the widow of *Johannes*. These facts were proved by *Mary Hogeboom*, the widow of *Stephen*.

The judge refused a motion for a nonsuit, and ruled against the defendant on all the points made. Among other things, he instructed the jury, that the testimony of *Mary Hogeboom*, if the jury believed it, furnished sufficient evidence of a demand for support and other privileges under the will, and of such refusal on the part of Stephen to fulfil, as forfeited the estate: that if the jury believed the testimony, the plaintiff was entitled to recover one-sixth part of the premises in question. *Exceptions* were duly taken. Verdict for the plaintiff. The defendant moves for a new trial on a bill of exceptions.

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H. Hogeboom, for defendant

M. T. Reynolds, for plaintiff.

By the Court, BRONSON, J. The provision in the will of Johannes Hogeboom for the support of his two daughters Gertrude and Helen, is something more than an *equitable mortgage* or *charge* on the land. The testator has used apt words of *condition*, and I find nothing in the will to limit or control their effect. There can be no doubt that Stephen held the estate on a condition subsequent; and if the condition has been broken, the estate is forfeited, and belongs to the heirs at law of the testator.

II. The condition was annexed to the estate as a part of the tenure, and would, of course, affect the land into whatever hands it might pass. It would be strange indeed if one holding lands by such a tenure, could defeat the condition by granting to another. If a requisition for that purpose is "made upon the present tenants, they must, as far as [*149] the nature of the case will permit, perform the condition. If they refuse, it will be at the peril of losing the estate. *Co. Lit.* 246 b. *Bradstreet v. Clark*, 21 *Pick.* 389. 4 *Kent*, 126. If there was a forfeiture in the lifetime of Stephen, neither his death, nor the subsequent alienation, can defeat the right of entry of the heirs at law of Johannes Hogeboom. In short, so long as Gertrude and Helen live, the estate, whether in the hands of Stephen, or of persons claiming under him, is held upon condition; and any forfeiture which may have happened, unless it has been released or barred by the lapse of time, may be asserted, against any one in possession of the land. A different doctrine would entirely change the nature of the tenure.

III. The voluntary departure of Gertrude and Helen to the county of Montgomery, and remaining there several years with the intention of making that the place of their permanent residence, did not put an end to the condition, nor preclude them from returning and demanding a performance, for the future, on the part of Stephen. He was bound to support them as long as they lived and chose to reside in his family. Their absence for a time could work no injury to him, whatever may have been the intention with which they left; and although he was not bound to act while they were absent, he was under a continuing obligation, which would operate on a request made, and could only be discharged by performance, or a release. If the right to support could be renounced, or the condition could be released, without a deed, I think it quite clear that a silent departure could work no such consequence. Indeed, if there had been an express agreement to relinquish the claim for support, it would have been necessary to show that it was made upon good consideration.

IV. If on a demand made, by the two daughters of the testator, support was *wholly refused* by Stephen, the condition was broken, and it was not

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necessary to resort to the surrogate before, or as a means of, asserting the forfeiture. After giving the land to Stephen, on condition that [*150] he supported the daughters "as is hereinafter mentioned," the testator went on to specify the manner in which they should be supported; and anticipating that disputes might possibly arise between the parties in relation to the *particular manner* in which the daughters might be provided for, he pointed out the mode in which such differences should be adjusted. The testator did not intend to refer to the surrogate, or to any appointed by him, to say whether Stephen should support the daughters. He had settled that question himself. But although the daughters might be provided for by Stephen, disputes might arise concerning the *sufficiency or reasonableness* of the provision; and those differences, and those only, the testator intended to have referred to persons appointed by the surrogate.

V. I see no difficulty in the plaintiff's case, until we come to the evidence upon which she relies for the purpose of making out a forfeiture; and here I differ very widely from the judge at the circuit. It is quite possible that some portion of the evidence has been omitted in making up the bill of exceptions; but on the case as it is presented to us, the evidence of a demand for support under the will, and of a refusal by Stephen, is so far from being *conclusive* on the question of forfeiture, that it would not, I think, have warranted a verdict for the plaintiff, had the question been submitted to the jury. Conditions which destroy an estate, are taken strictly; and although a forfeiture must be enforced when clearly established, it should not prevail upon doubtful construction of evidence. If anything is to be done as a condition precedent by the party who asserts the forfeiture, he must show a strict performance on his part; and this is so, whether the obligation upon him is created by express stipulation, or is implied by law from the nature of the act to be performed by the other party. He who may lose by a breach of a condition, must be plainly put in the wrong; and mere words on his part, as a denial of the right, without any act done, will not always work a forfeiture. I shall only refer to a few cases in support of these positions. *Maund's case*, 7 Co. 112. *Fraunces' case*, 8 id. 177, also reported by the name of

[*151] *Miller v. Francis*, 2 Brownl. & Gold. 277. 9 Co. 51. *Bacon's Abr. Condition* *(O), 1. *Comyn's Dig. Condition* (N).

Bradstreet v. Clark, 21 Pick. 389. In this last case, the court acted upon a distinction, which I think a sound one, between a demand for the purpose of laying the foundation of a suit to recover money, and a demand which is to work the forfeiture of an estate, and held that there must be much greater strictness in the latter than is required in the former case. The estate was held on condition that the devisee paid certain legacies, and because all the legacies were demanded, when two had been paid, the demand was held insufficient, although the tenant denied the right altogether.

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The niceties which are required at the common law in making such a demand as will authorize a re-entry for the non-payment of rent, is a familiar example of the great strictness which is required where the party seeks to inflict the heavy penalty of a forfeiture of the whole estate.

Now, what is the evidence in this case to establish a breach of the condition? Ten years before the conversation on which the plaintiff relies, she and her sister voluntarily left the house of Stephen, went to Montgomery and purchased real estate, with the intention of residing there permanently; and there they had resided for the whole ten years. Although they went occasionally back to Columbia, and made pretty long visits, the case furnishes no evidence that they did so with the intention of changing their place of residence. When the conversation took place in June 1834, they had been with Stephen seven or eight months; but the case states that they came *on a visit*; and there is not one particle of evidence going directly to prove that they made any demand or request whatever upon Stephen, or that they even intimated the intention of remaining with him for the purpose of receiving the support provided for by the will. In fact, it does not appear that they had made up their own minds to pursue that course; and for aught which can be gathered from the case, they would not have remained with Stephen, if he had requested them to do so. True, Stephen told them, "he thought they had no right there, because they had gone away of their own accord, and had long ago lost all claim under the will;" and if those words stood alone, they would furnish some ground for [*152] a presumption that the daughters had made a demand or request. But when taken in connection with the preceding words, little if any thing remains of the presumption. Stephen began by saying, "if they called it a *visit*, he thought they had stayed about long enough." It seems probable from this, that a *visit* was the only thing of which the daughters had spoken.

The plaintiff insists on a forfeiture, and the burden lies upon her of showing the condition broken. After it appeared that she had changed her residence to Montgomery, it was necessary for her to show, beyond all reasonable ground for doubt, that she returned to the house of Stephen for the purpose of receiving the support provided for her by the will; and that she plainly made known her intention to Stephen. She could not act equivocally, and leave him in doubt whether she was there *on a visit* or *under the will*, and then construe his words, which included both views of the subject, into a breach of the condition. And besides, when Stephen told the daughters he thought they had no right there—that they had lost all claim under the will—they seem to have acquiesced in his opinion. They made no reply or objection to the remark. They left him at liberty to believe that they were only there for a temporary purpose, without intending to claim any thing under the will, and went away two weeks afterwards without correct-

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ing that impression ; and now after he is dead, and the farm has gone into the hands of others, they insist that Stephen forfeited the estate. That will never do. They were bound to speak at the time. What Stephen said amounted to little more than the expression of his *opinion* ; and if such words could under any possible circumstances amount to a breach of the condition, they certainly could not work any such consequence, when they were apparently acquiesced in by the other party. If the daughters had answered by asserting their claim, it is highly probable that Stephen, whatever might be his opinion about the matter of right, would have furnished the support, so as to avoid all question about the title to the farm.

[*153] But however that may be there is not sufficient evidence that he ever refused compliance with the terms of the will.

We might have omitted the expression of an opinion upon the other points in the cause ; but the counsel for both parties were desirous that all of the questions presented by the bill of exceptions should be considered, for the purpose of narrowing the grounds of controversy on another trial

New trial granted.

GLOVER vs. TUCK and others.

One *partner* may maintain an *action of covenant* against his *co-partner*, whether the covenant be to pay any sum or do any act for the purpose of only *launching the partnership*, or whether it be to perform any of the articles after the partnership has commenced. An *action of covenant* will lie although there may be accounts between the parties which require unravelling in equity. And where the partnership covenants have not been infringed for any length of time, the *action of covenant* is the proper remedy : a court of equity not interfering to restrain the breach of covenant, unless the bill pray and there are just grounds for a *dissolution*.

Where a specific act is to be done by the plaintiff, or any number of acts to be done by him by way of *condition precedent*, he must shew in pleading precisely what he has done by way of performing them, with such *circumstances* as are material in point of law to raise the corresponding obligation.

Where there are *several breaches* assigned in one count, some *good* and some *bad*, and there is a demurrer to the whole count, the plaintiff will have judgment. The proper course for the defendant in such case is to demur to the defective portions of the count.

DEMURRER to declaration in covenant. The plaintiff recited in the first count, that he severally, and the defendants in common, were before, and at the time of the agreement executed, seized of land bearing pine timber in the state of Michigan, viz. the plaintiff of 1120 acres, the defendants viz. Tuck of 500 acres ; Ewer, 1500 acres ; R. Runker, 406 acres $\frac{1}{3}$ of an acre, and C. Runker 800 acres ; and that on the 27th of February, 1837, by sealed agreement between the plaintiff and defendants, the parties agreed, each with all the rest, separately and collectively, that they would pay their [*154] proportions of the expense of erecting a steam saw mill on said

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land, near Lake Huron, of a prescribed power, with fixtures, &c. with the design of cutting timber from said lands. That the defendants agreed to *honor* the plaintiff's drafts on them, to be made from time to time as his contracts, and the execution of the proposed plan might require, to an amount not exceeding \$8000; and authorized him, with the funds thus to be provided, to procure a steam engine for the mill, &c., and that they also covenanted to defray his necessary expenses and advance his proportion of the common outlay, he paying interest, and agreeing to refund the same as provided in the agreement. That he on his part covenanted with the defendants, that he would immediately proceed in his duties under the agreement, and devote his whole time and attention to the prosecution of said plan or operation, without compensation, until the mill should be erected and put in successful operation; and that he should thereafter, during one year, continue his services as agent or superintendent, for a reasonable compensation, &c. and would not otherwise engage during the year, &c. He then averred that, to carry out the above purposes, he relinquished the nautical profession; and although he *had performed and fulfilled and had always from the time of executing the agreement been ready and willing and had offered to perform and fulfil the covenants and agreements in all things on his part to be fulfilled, had lost his time, and expended \$2000 in this behalf*; yet the defendants did not, nor would, *although often requested so to do*, in any manner perform the said agreement and did not nor would pay any proportion of the expense needful and incidental to the erecting of the mill; and did not nor would pay any sum for the fixtures, and did not nor would honor the plaintiff's drafts on them, although the contracts of the plaintiff and execution of the said proposed plan required the same to be honored; and although he made and caused such drafts to be duly *presented*, viz. one draft for \$1000, dated March 1st, 1837, another of \$1750, &c. and did not nor would defray the said plaintiff's necessary expences; and did not nor would advance the plaintiff's proportional part of the common outlay, nor any portion thereof; and **that the agreement had not been in any manner [*155] performed by them, nor the plan in any manner commenced or carried into effect.*

The second count stated that, by a sealed agreement of the same date, it was agreed between the plaintiff and defendants to cut the timber upon certain lands in the state of Michigan, part of which were owned by the plaintiff, and other parts thereof by the defendants. And it was also covenanted by the defendants, that the plaintiff should become the agent and superintendent in the erection of a steam saw mill, with the requisite machinery on said land near Lake Huron, for the purpose of sawing the timber, and that the defendants would furnish him with the necessary funds to an amount not exceeding \$8000 for the erecting and furnishing thereof, and for carrying

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on the said operation, the plaintiff agreeing to pay interest on a certain proportion of the sum to be advanced, and to refund the same. Farther, the defendants agreed that they would defray the necessary expenses of the plaintiff in the discharge of his duties under said agreement. That it was farther provided that, after the mill should be erected and put in successful operation, the plaintiff should, for one year thereafter, continue his services as agent, &c. for a reasonable compensation, &c. The plaintiff then averred that, immediately on the execution, &c. he relinquished all and every occupation, &c. for the purpose of performing the said covenants, &c. on his part, &c. and hath always, from the time of the making of the said covenants, &c. to the time of the commencement of this suit, *been ready and willing, and had offered to perform and fulfil the said covenants, &c. on his part, &c.* Yet the defendants did not nor would, *although often requested, &c.* furnish the said plaintiff with the requisite funds for the erection and furnishing of the said mill in pursuance of said covenants and agreements, nor in any manner carry the said agreement into effect, and by reason of such delay and refusal the plaintiff was put to great inconvenience, &c. and hath paid and disbursed in necessary expenses \$2000, &c.

The defendants craved oyer of the agreement, which was [*156] *granted. It recited the interests of the parties nearly as set out in the first count, and that they had agreed to put the said interest into *a common stock*, with a view to cutting the timber from the land. They then agreed each with all the rest separately and collectively, as recited in the said first count; that the agreement should continue and be binding on them, their heirs and assigns, until all the timber should be cut, &c. That, in making sale of any portion of the interest of any of the parties, provision should be made by the party disposing, &c. for the responsibility of the purchaser, and his acquiescence in the intended operation, each not to dispose of more than one-third of his interest, without consent of the others now interested. That a statement of the operations of the *partnership* should be made every six months, accounts rendered, and *proceeds, if any, divided*, according to the respective proportions of the *co-partners*. The defendants put in a demurrer to each count, setting forth a great number of special causes of demurrer.

S. Stevens, for the defendants. I. The agreement or instrument declared upon, is an agreement creating or constituting a *partnership* composed of the plaintiff and defendants, and an action at law does not lie upon it.

II. An action at law cannot be sustained upon or for the breach of any covenant in such an agreement, unless it be a covenant to be performed before the business of the partnership is to commence; or the covenant be to perform a specific thing *after* the partnership commences. The agreements

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here are in relation to the general concerns of a partnership. 12 *Johns. R.* 401.

III. The covenants alleged to have been broken were not covenants to be performed before the business of the partnership commenced.

IV. A general averment of performance on the part of the plaintiff is not sufficient. He should aver specifically the fact and manner of the performance of the particular acts and things on his part which entitle him to call on the defendants for performance, or which would show the defendants were required to perform on their part. 4 *Wendell*, 551, and cases there cited.

V. Both counts are defective in not averring a *special request* to perform. [*157]

VI. The second count is defective for want of certainty in the several particulars specified in the special causes of demurrer.

J. Greenwood, for the plaintiff. I. The agreement declared upon does not create a partnership.

II. If it does, the action can nevertheless be maintained.

III. The averments and assignments of breaches in the declaration are sufficient: 1. A general averment of performance is sufficient; the acts to be performed involving no question of law, but being mere matter of fact. But there are also other sufficient averments of a more particular character. 2. The particular nature and details of the plaintiff's expenses, what his contracts were, and how far the plan had been executed, are all matters of evidence. 3. No special request of payment was necessary. The covenant imposes the duty to pay. Notice is all which, in any view of the case, could be necessary. 4. The drawing and presenting of the drafts constitute notice; and these are the mode of payment provided in the agreement. 5. Even a general averment of non-performance is good unless demurred to, and this assignment in the first count is not demurred to.

IV. The want of a special request, stating time and place can be taken advantage of only on special demurrer. This objection is not stated in the demurrer to either count except as to the plaintiff's expenses, and as to these there is no assignment of breaches in the second count. Notice is included in the request laid. The averment as to performance, and assignment of breach in not furnishing the requisite funds, in the second count, are sufficient.

V. If any of the breaches in either count are well assigned, plaintiff is entitled to judgment as to that count the demurrer being to the whole count.

*By the Court, COWEN, J. There is not the least question that this [*158] action is well founded in principle. The objection that the articles

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of agreement between the plaintiff and defendants constituted a partnership, in consequence of which the plaintiff's remedy lies in a court of equity only, is thus answered by *Collyer on Partnership*, 132, *Am. ed.* 1839: "One partner may maintain an action of covenant against his co-partner, whether the covenant be to pay any sum, or do any act for the purpose of only launching the partnership, or whether it be to perform any of the articles after the partnership has commenced. An action of covenant will lie, although there may be accounts between the parties which require unravelling in equity. And where the partnership covenants have not been infringed for any length of time, the action of covenant is the proper remedy; a court of equity not interfering to restrain the breach of covenant, unless the bill pray, and there are just grounds for a dissolution." I have examined the leading cases cited by him, and find that his doctrine is clearly sustained by the English authorities; and there is no case in this state, I apprehend, which trenches upon it in the least. *Niven v. Spickerman*, 12 *Johns. R.* 401, is relied on; but that appears to be an action of covenant for a general balance of account, after the partnership had been in operation some two years. I do not perceive that there was a covenant to pay any balance; but the action seems to have been brought on a notion that it would lie, merely because the articles which formed the partnership were under seal. Where, as in the case before us, the covenant is to make specific advances for the purpose of launching the partnership, I presume the right to an action was never questioned. See *Townsend v. Goewey*, 19 *Wendell*, 424. Several American cases cited in the same edition of *Collyer*, appear to concede the rule as laid down by him in its full latitude. Mr. Chitty, 2 *Chit. Pl.* 524, *ed. of 1828*, gives a precedent in covenant on articles, which supposes the partnership to have been some time carried on; though he suggests that on a covenant to account, the plaintiff must encounter the inconvenience of being confined [*159] to nominal damages. "Therefore, if there has been no balance struck, he must resort to equity for his share of the profits. The following cases, not cited in *Collyer* at the page mentioned, will also be found to bear in favor of the plaintiff: *Owston v. Ogle*, 13 *East*, 537; *Musier v. Trumpbour*, 5 *Wendell*, 274. Several cases cited by me in *Townsend v. Goewey*, 19 *Wendell*, 429. *Bradenhurst v. Bates*, 11 *Moore*, 421; 3 *Bing.* 463, *S. C.*

The substance of the agreement by the defendants here was, that they would enter into partnership with the plaintiff, retaining him as agent and superintendent in the adventure, and furnishing him with such funds as might be necessary for launching and prosecuting the business. The extent of the advances were, for the purposes of his declaration at least, limited to the acceptances of drafts or bills on them, to be made from time to time, as the

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plaintiff's contracts and the execution of the proposed plan might require, to an amount not exceeding \$8000, to the defraying of his necessary expenses, and the advance of his proportion of the common outlay, on certain terms. The plaintiff covenanted immediately to proceed in his duties, and devote himself exclusively to the performance of them. He avers that, in pursuance of the agreement, he abandoned his other business; and although he had performed and fulfilled, and had always, from the time of the execution of the agreement, been ready and willing, and had offered to perform and fulfil the covenants and agreements on his side, and had in this expended \$2000, the defendants would not, although often requested, &c. in any manner perform—would not pay any proportion of the needful expense in erecting the mill nor for the fixtures, nor honor the drafts, though the plaintiff's contracts and the execution of the plan required them to be honored, and though he caused certain described drafts to be presented. Nor would they defray the plaintiff's necessary expenses, nor advance his share of the out-lay. The mill or any part of it was never erected, nor did any one, so far as we learn from the declaration, ever take any definite step in the progress of the concern.

It is quite obvious that the liability of the defendant to any extent, depended on conditions prescribed in the agreement, "to be performed by the plaintiff. He is, therefore, bound to show, in proper form, [*160] the actual fulfilment of those conditions; or some excuse why they have not been fulfilled.

As to the acceptance of bills, the amount was to depend on the plaintiff's contracts and the exigencies of the work in its progress. Now the plaintiff does not show that he ever entered upon the plan, so far as to make contracts, or that he did any other act by which liabilities were incurred. I think it was necessary for him to set forth the facts specifically, upon which he bases his claim to acceptances, such as that he had contracted for an engine, or fixtures, or had demanded an acceptance for the purpose of purchasing them, which had been refused. This being so, it was necessary, not merely that drafts should be presented under the notion of general necessity; but the defendants should have been advised of the particular purpose. It was, therefore, necessary to aver farther, that special notice was given of the purpose. We want to know the exigencies of the business, and what these were.

Again: the complaint is, that they would not employ the plaintiff, or receive him into their service, though he had performed, and was always ready to perform. But what specific act of performance is averred? None. What was the offer? Did he tender himself, declare his readiness, and meet with a refusal? He does not say that he ever even requested the defendants to employ him pursuant to their covenant. But he avers that he offered to perform his covenants and agreements. Assume that this offer

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was made to the defendants, and is a sufficient allegation of notice ; did they refuse to employ him, or obstruct his going on with the adventure ? It is not said they refused to permit him to proceed. But it is said generally the defendants would not perform ; adding that they refused to do certain specific things which clearly we cannot hold they were bound to do, till we see the plaintiff had done more than to make his general offer.

It is quite well established, that where a specific act is to be [*161] done by the plaintiff, or any number of acts by way of 'condition precedent, he must shew in pleading precisely what he has done by way of performing them. 1 *Chit. Pl.* 278, ed. of 1828. *Id.* 282. If a deed is to be given, or money to be paid, or services to be performed, he must either aver in so many words, that the deed has been given, the payment made, or work done ; or that each by name was tendered and refused, with such circumstances as are material in point of law to raise the corresponding obligation. *Id.* 282, 3, 4. And so of like instances. *Mansel on Demurrer*, 51, 2. This enables the court to see whether the defendants be in fault ; and presents matter on which he can take a definite issue. *Thomas v. Van Ness*, 4 *Wendell*, 449, 552, 3. The allegation of performing every thing, or offering to perform every thing, involves in itself many possible acts of performance, and invites an issue on all of them. It cannot be seen on what the parties go down to trial. Indeed the plaintiff here offers an issue on a double set of possible facts. He says he *had* performed all, and *offered* and *was ready* to perform all. And this he contends raised a precedent obligation on the part of the defendants, so as to supersede the necessity of special notice, and make the bringing of a suit sufficient notice. The generality here would be a substantial defect even were it negative, and by way of breach, which need never be so special as the averment of a performance intended to satisfy a condition precedent. *Barton v. Webb*, 8 *T. R.* 459. *Hughes v. Smith*, 5 *Johns. R.* 168. *McGeehan v. Bridget*, 1 *Hall*, 33. *Post Master General v. Cochran*, 2 *Johns.* 413. *Vid. also Mansel on Demurrer*, 48, 49, 26, 65, 66. I refer to this author, p. 55 to 58, for illustrations of the rule that you must show the condition well and exactly performed.

There is certainly a case mentioned in *Mansel*, 57, going to show that the plaintiff has very nearly made one sufficient averment. I mean as to his loss of time, being put to inconvenience and incurring expenses. It is the case of *Jermy v. Jenny, T. Raym.* 8. Yet in both counts, these are made so much a dependence or consequence of the general performance, or general offer to perform, that they cannot be served, and thus answer [*162] the rule that any part *of the count being good, the demurrer being to the whole, must fail. The substance is, that the plaintiff had necessarily spent \$2000, in his acts of general performance and loss of

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time, &c. or by reason of not accepting his general offer. Had the averment been distinct, that the expenses were incurred by doing any act or acts, sufficiently shown to be within the condition, it would, according to *Jermy v. Jenny*, have been enough, even without a special notice. It would, under the direct covenant to pay necessary expenses, perhaps have raised a duty; and by the case cited, it need not have been shown more particularly how the expenses arose, or to whom or on what particular occasions it was paid. *Vide Barton v. Webb*, 8 T. R. 459.

I admit the question I am now examining, is one of *quo modo* merely; nor do I deny the rule insisted on, that where a condition precedent lies by the covenant itself in a definite and certain form, so definite that it need not be made more certain for the purposes of pleading, there it is enough to say generally that the party has performed it according to the intent and meaning of the agreement, if the condition as contained in that, were fully stated; and so of any number of acts by way of precedent condition. *Wright v. Tuttle*, 4 Day, 313. But this is very rarely so. Clearly it is not the case at bar; and one of the very authorities cited by the defendant's counsel, goes directly to prove, that when a condition relates to some general business, comprehending divers acts, the *quo modo* must be shown in a plea of performances. *Post Master General v. Cochran*, 2 Johns. R. 413.

Both the counts stand on substantially the same footing, as to substance and form. The second professes to be a summary statement of the agreement according to its legal effect. But the *oyer* must be taken as making a part of each count. That being imported into the second, it presents defects of almost literally the same character with those in the first. If there be any difference, it is in the greater meagreness of the second. The averment is simply of a general readiness to perform. Actual performance is not mentioned. But the objection is not to the substance hinted "at, for either readiness or performance is enough; the objec- [*163] tion is, that neither is stated, so that an issue could be framed. We are not told what the plaintiff did by way of performing or attempting to perform. Did he tender himself at a proper time and place? was he rejected? Did he go on to Michigan? Look over the ground? ascertain the wants of the adventure, and give notice of these when the drafts were sent? Was he in all this out of pocket, and did he call for reimbursement, giving special notice of the amount, and that it arose in the line of the business? Was the business so far matured as to call for an advance of his share of the outlay, or indeed for any advance? and as the agent of the concern, was this fact communicated to the defendants? at what stage of the matter, in short, and under what circumstances were the defaults complained of on the part of the defendants committed? The plaintiff was the active man. He was to move, advise, make calls, execute. The objection

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is, that neither all these things nor any of them are so communicated by a mere hint, thus: "Although the plaintiff had performed, or was ready, and the defendants, although often requested, &c. did not and would not do this and that."

To the objection of the want of notice. Perhaps it is truly answered, that supposing actual performance of any condition precedent to be sufficiently averred, no notice of it need be alleged; that the party undertakes and is bound to notice it at his peril, and the *licet scepisus requisitus* will do. *Mansel on Demurrer*, 30, 48. 1 *Chit. Pl.* 286, 287, *ed. before cited*. But performance in any way is averred by the first count only; and there the averment is defective as being general. Perhaps it may also be correct to say that the offer to perform, averred both in the first and second counts, would be sufficient as implying special notice. I do not see that this averment is demurred to for its generality. *Vide 1 Chit. Pl.* 283, *4th ed. before cited*.

Nor do I think any serious objection can be made, especially to the first count, for generality in the assignment of breaches. So far as mere general non-performance is concerned, the objection is valid. But that [*164] is helped by the "setting forth of several specific breaches with sufficient exactness. The demurrer goes to the whole count, and is answered by the correct assignment of any single breach, even though there may be several others altogether defective. *Mansel on Demurrer*, 49. 1 *Chit. Pl.* 576, 7, *ed. before cited*. The doctrine is quite familiar as between different counts. *Chitty* says it is the same as between different divisible allegations in the same count; and if you mean to attack any one of them where the count contains others that are sufficient, you must put your finger on the defective portion. A count may be thus dissevered, and judgment be rendered on one part for the plaintiff and as to another for the defendant, just like a declaration made up of several counts. *Benbridge v. Day*, 1 *Salk.* 218. It is quite doubtful, however, whether any one breach is well assigned in the second count.

On the whole, because the plaintiff has not shown any such specific steps on his part as to put the defendants in default, judgment must go for them, with leave to amend.

1
Judgment for defendants.

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FOX vs. LIPE.

An administrator's deed, under an *order of sale* made by a surrogate previous to the passage of the act of 1819, requiring a *confirmation* of the sale by the surrogate, is a good and valid deed, although executed subsequent to the passage of the act, and without the sale having been confirmed by the surrogate; the act applies only to future cases.

Whether an 'administrator authorized by a surrogate to *mortgage lands* of the intestate, can legally include a *power of sale* in such mortgage, and whether a foreclosure under such power is valid so as to bar a redemption of the premises, *quere*; but at all events, where the mortgage has been foreclosed under such power and the *mortgagor* has entered into possession, an *action of ejectment* will not lie against him by the heirs of the intestate.

The *filling* of a bond by the administrator, faithfully to apply the moneys to be raised by the mortgage *seven days* after the execution of the mortgage, is a sufficient compliance with the act requiring such bond to be filed.

A mortgage taken on the loan of \$700, to be paid in *ten years* with interest, (the interest not to be paid until the expiration of the ten years,) is *not usurious*, though the loan be made upon an agreement that the *mortgagor*, in addition to the interest reserved, shall have, free of rent, the use and *occupation* of an acre of the mortgaged premises, worth [*165] eight dollars per year: the whole compensation for the loan not being equal to a reservation of *compound interest*.

THIS was an action of *ejectment*, tried at the Montgomery circuit in May, 1839, before the Hon. JOHN WILLARD, one of the circuit judges.

The plaintiff claimed to recover one-sixth part of a farm of 120 acres, whereof his father, *Peter W. Fox*, died seized in June, 1816, leaving him and five other infant children his heirs at law. The defendant gave in evidence letters of administration to the widow of the deceased; also two orders (with other proceedings,) of the surrogate of Montgomery, directing the sale of portions of the lands of the intestate for the payment of his debts—the one order made July 12, 1817, and the other, February 2, 1819. He also gave in evidence deeds from the administratrix and others, one to the defendant, and the other to Casper Lipe, his father, for several parcels of the land in question, bearing date April 19, 1819. Also an order of the surrogate, made July 24, 1819, authorizing the administratrix to mortgage the residue of the premises in question in this suit, for the payment of the debts of the intestate. Also a mortgage in pursuance of the order to *Casper Lipe*, dated August 31, 1819, conditioned for the payment of \$700 with interest in ten years thereafter. The mortgage contained the usual power of sale, under which the land was sold in April, 1830, and purchased by the *mortgagor* for \$1260. Casper Lipe, the *mortgagor*, and grantee in one of the deeds is dead, and the defendant is his child and only heir at law. The plaintiff insisted: 1. That the deeds were void, because the sales had not been *confirmed* by the surrogate; and 2. That the power of sale in the mortgage was void, and did not warrant a statute foreclosure: these objections

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were overruled, and the plaintiff excepted. The plaintiff objected, *thirdly*, that the mortgage was void, because executed before the administratrix had given a bond pursuant to the statute, for the faithful application of moneys raised on the mortgage. The defendant thereupon produced a certificate signed by the surrogate, and dated September 7, 1819, in which [*166] the surrogate stated, that the administratrix had *that day* delivered to him a bond executed by herself, her then husband, and two sureties, *conformable to the statute*. The surrogate who granted the certificate testified that he had no doubt that the bond mentioned in the certificate was delivered to him and filed in the surrogate's office on the day the certificate bears date. The present surrogate testified that he had made diligent search for the bond, and could not find it. The plaintiff insisted that the testimony did not prove that such a bond as the statute requires was filed before the execution of the mortgage, or that such bond had ever been filed. The objection was overruled, and the plaintiff excepted.

Fourthly : the plaintiff gave evidence for the purpose of showing the mortgage void for *usury*. On application to *Lipe*, the mortgagee, to make the loan and take the mortgage, he refused, unless he could have the use of one acre of the land mentioned in the mortgage for the ten years the mortgage was to run : the administratrix at first refused, but afterwards consented to those terms ; and Lipe took possession of an acre of land, and held it until the mortgage was foreclosed. The use of the land was worth *seven or eight dollars a year*. The judge decided that the mortgage was void for usury. Exception. Verdict for defendant. The plaintiff now moves for a new trial on a bill of exceptions.

D. Cady, for plaintiff.

J. A. Spencer, for defendant.

By the Court, BRONSON, J. Under the act of 1813, some discreet person or persons, to be appointed by the surrogate, was to unite with the executor or administrator in making conveyances under an order of sale by the surrogate. 1 R. L. 451, § 34. On the 12th of April, 1819, an act was passed, *repealing* this section, and providing, that on sales *thereafter* to be made, it should be the duty of the executor or administrator [*167] to make a return of the "proceedings on the order for a sale, to the surrogate, who should examine the same, and if it should appear that the sale had been legally made, and the proceeding fairly conducted, the surrogate should make a further order, *confirming* the sale, and directing conveyances to be executed. Statutes of 1819, p. 214, § 3, 4. This statute was passed seven days before the two deeds to the defendant,

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and to his father, Casper Lipe, bear date ; but the orders for the sales had been made long before ; and if, as is highly probable, the sales had been made before the 12th of April, and nothing remained to be done but to execute conveyances, the statute of 1819 has nothing to do with the case.

But inasmuch as it does not appear when the sales were in fact made, it is, perhaps, necessary to assume that they were made on the day the conveyances bear date. In that view of the question, I still think the deeds may be upheld, although there was no order confirming the sale. The third and fourth sections of the act of 1819, only applied to sales which should be *ordered*, as well as *made*, after the passing of the act. These sales had been ordered under the act of 1813 ; and the orders should, I think, be executed in the same manner as though the act of 1819 had not been passed. The legislature repealed one provision, and substituted another in its place. They said, it should no longer be necessary to appoint a person to unite with the executor or administrator in making conveyances ; but in lieu of that safeguard, the executor or administrator should report the sale to the surrogate, and obtain a confirmatory order. I cannot think that the law makers intended to annul any part of an order of sale already made, or make any change in the manner of executing it. In short, the act of 1819, only applied to future cases, and did not touch those which had been previously commenced under the act of 1813, although the execution was not then completed.

II. Although a power of sale is not mentioned in the statute, § 28, and is not a necessary part of a mortgage, it is usually inserted ; and I am not prepared to say, that the power in this mortgage, or the sale under it, was void. But it is unnecessary to decide that question. Whether "the heirs of Fox can still redeem, notwithstanding the statute [*168] foreclosure, is not now the question. It is enough to defeat this action, that the defendant is in possession as heir at law of the mortgagee.

III. The statute provides, that before any executor or administrator shall execute a mortgage, he shall execute a bond to the people, with sureties, conditioned for the faithful application of the moneys to be raised by the mortgage, *which bond shall be filed in the office of the surrogate.* 1 R. L. 453, § 29. The secondary evidence was, I think, sufficient to show, that a bond, "*conformable to the statute,*" had been *executed*, and that it was *filed* in the surrogate's office ; and the only possible objection is, that the bond was not filed until seven days after the mortgage bears date. The statute does not say, that the bond shall be filed, as well as executed, before the mortgage is given. It contains no nullifying words, and I think the bond, when filed, was good, and took effect, by relation, from the day of its date. *Jackson v. McMichael, 3 Cowen, 75, and cases cited.*

IV. Nothing remains but the question of usury. The loan was \$700.

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The mortgage had ten years to run, and interest was not payable until *the end of the term*. Including the rent of the acre of land, the mortgagor got less for the use of his money than he would have received on a reservation of *annual* interest, which would have been free from all *possible objection*. Although chancery will not enforce an agreement made in advance to pay compound interest, it seems to be agreed that such a contract is not void for usury. *1 Johns. Ch. R.* 13, 6; *id.* 313. *1 Paige*, 98.

But the mortgagor did not, in legal effect, get the use of the acre of land, as a part of the contract of loan. The administratrix had no power to dispose of the land, and although the mortgagor entered and occupied the property, he might have been ousted by the heirs at law of Fox, and to them he was accountable for the rents and profits. It was said on the argument, that if the borrower pays more than legal interest, it matters not how he obtained the money to make the payment—if he stole it, the transaction will [*169] “nevertheless be usurious. That is undoubtedly true: but the proposition obviously assumes that the excessive interest was actually paid. That is not this case. The administratrix parted with nothing; nor did she authorize any control over the property of the heirs of Fox. She neither passed any interest in the acre of land, nor did she undertake to secure the enjoyment of it to the mortgagor. In short, the conversation about the acre of land was of no legal importance whatever.

I think the cause was properly disposed of at the circuit.

New trial denied.

HOLBROOK and others vs. WRIGHT.

Where a party consigns goods to another and sends him a letter of advice, and immediately after draws upon the consignee for funds, who accepts the drafts, a jury are warranted in finding a contract and that the title to the goods has vested in the consignee, although there be no *express* agreement to that effect.

Where on the trial of a cause certain facts are assumed to exist, without the proof of which the action could not have been maintained or defence sustained, the losing party on a motion for a *new trial* cannot insist upon the absence of such facts in a case made on which to move for a new trial.

A factor *del credere* who has made *advances* upon goods consigned to him for sale, and which have been delivered to a third person to forward, has a *lien* upon the goods, and may maintain an action against the bailee for non-delivery.

Where the partner of a bailee refuses to deliver goods to the owner, saying that *he does not feel authorized to deliver them up in the absence of his partner*, the bailee in an action against him cannot object that the demandant did not exhibit the evidence of his title; if that was the true reason for the *non-delivery*, the partner should have said so, and if the refusal had been made in *good faith*, the defendant would have been protected.

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A *bailee* acknowledging by receipt to hold the goods for a third person, is in itself a *conversion*, and after having done so, and the agent having placed his refusal upon the absence of his principal, the bailee cannot claim to hold on the ground of *lien* for *storage* and *charges* paid. In an action of *replevin* in the *detinet*, the proof of *refusal* need not be as strong as in *trotter*.

THIS was an action of *replevin*, tried at the New-York circuit in November, 1838, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiffs declared in the *detinet* for 14 boxes of sattinets, [*170] containing 8136 yards of that article. The plaintiffs, commission merchants in *New-York*, received from a manufacturing establishment in *Middlebury*, (*Vermont*.) conducted by *M. Ticknor & Co.*, an *invoice* of upwards of 4491 yards of sattinets accompanied by a letter in these words: "Middlebury, Dec'r 24th, 1836, consigned to Holbrook, Nelson & Co.—Gent. The above are all put up, ready to send to Troy as soon as the going is suitable, which at present is very bad; they will be forwarded as soon as may be and insured;" and subsequently another invoice of 3645 yards, also accompanied with a letter in these words: "Consigned to Holbrook, Nelson & Co. Middlebury, Jan'y 20, 1837. Above, you have the balance of satts belonging to us; 11 cases have been sent to *White, Baker & Morrell*, (*Troy*.) We have 8 on hand, which we intend to send in the course of 10 days. We have directed them to insure \$3000 on them." On the 24th December, 1836, *M. Ticknor & Co.* drew upon the plaintiffs for \$2000 at three months; and on the 14th January, 1837, for another \$2000 at three months; and on the 28th January, 1837, for another \$2000 at three months—which drafts were accepted by the plaintiffs. The plaintiffs previous to this time had been the agents of *M. Ticknor & Co.* in selling their goods, and on the 1st November, 1836, *M. Ticknor & Co.* were indebted to them upwards of \$3000. In the winter of 1836 and 1837, *White, Baker & Morrell* received for storage from *M. Ticknor & Co.* 14 cases of sattinets, marked "H. N. & Co., 53 Pine-street, New-York," (the names of the plaintiffs are Lowell Holbrook, Thomas S. Nelson, and William E. Shepard, conducting business under the name of *Holbrook, Nelson & Co.*) subject to future orders, and with directions to obtain insurance to the amount \$3000. On the 10th February, 1837, *White, Baker & Morrell* sent to the store of *Daniel Wight*, the defendant in this cause, twelve of the boxes of sattinets, in pursuance of an order from *M. Ticknor & Co.*, in these words: "Bennington, Feb'y 4, 1837. Messrs. *White, Baker & Morrell*—Please deliver to Daniel Wight all the Boxes sattinets in store, as I have agreed with him to forward them to N. York;" which were received by *George W. Wight*, a partner of *Daniel Wight*, who gave a receipt for them, dated 10th February, 1837, signed, "D. Wight by Geo. W. Wight." *White, Baker & Morrell* received from *D. Wight* their charges for storage and money advanced for insurance. In May, 1837, *Nel-*

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son, one of the plaintiffs in this cause, went to the place of business of D. Wight, where he found *George W. Wight*, (D. Wight not being in,) and demanded the sattinets in question, saying they had been assigned to him and his partners by M. Ticknor & Co., to which George W. Wight answered, that *he did not feel authorized to deliver up any goods in the absence of Daniel Wight*. Whereupon the goods were replevied by the plaintiffs and taken away. After the goods were replevied, D. Wight acknowledged that his instructions were to send the goods to the plaintiffs in New-York, and that he did not send them, because they had been assigned by M. Ticknor & Co. to *Elnathan B. Goddard*, and he had received notice of that assignment.

It appeared in evidence that the firm of M. Ticknor & Co. consisted of *Myron Ticknor* and *Stephen Hinsdill*; Ticknor residing at *Middlebury*, and carrying on the manufacturing business at that place, and *Hinsdill* at *Bennington*, at a distance of 90 miles from Middlebury, conducting the financial part of the business. The invoices were in the hand-writing of *Ticknor*, and the drafts upon the plaintiffs and the order to White, Baker & Morrell being in the hand-writing of *Hinsdill*. On the part of the defendant, it appeared that on the 9th February, 1837, *Ticknor*, to secure *Elnathan B. Goddard*, as an endorser for the firm of M. Ticknor & Co., assigned to him the fourteen boxes of sattinets then in the hands of White, Baker & Morrell, and gave orders to the latter firm to deliver the goods to Goddard. *George W. Wight*, on the 20th February, 1837, gave a receipt in these words: "Recd. in store twelve cases of sattinets from M. Ticknor & Co., subject to the order of E. B. Goddard of Middlebury, Vt." and signed thereto the name of the

firm of "D. Wight & Co." of which firm he was a member; and [*172] on the 27th of the same month, *D. Wight himself gave a similar receipt for two boxes of sattinets. *Myron Ticknor* testified that he sent to the plaintiffs the invoices produced on the trial, and at that time intended to send the goods to them; that a note of the firm endorsed by *Goddard* having been protested, he assigned the sattinets as security to Goddard, not knowing at the time that *Hinsdill* had drawn the drafts produced on the trial, and believing that the plaintiffs had a sufficiency of goods in their hands belonging to his firm to pay and satisfy them for any sum they might be in advance for the firm. He further testified, that there was no bargain or understanding between him and the plaintiffs that the title to the goods should vest in the plaintiffs; that he directed the goods to be insured as the property of his firm.

The judge charged the jury, that the evidence was sufficient to warrant them in finding that the goods were received by the defendant to be delivered to the plaintiffs; that a sufficient *demand* had been made before suit brought; that the defendant not having claimed a *lien* for storage or charges at the time of the demand, could not now set it up in bar of the action; that if, from

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the testimony, they should come to the conclusion that there was a contract between the parties that the property should be forwarded to the plaintiffs by M. Ticknor & Co., and that the plaintiffs on accepting the drafts should be satisfied out of the proceeds of the property, the plaintiffs had a right to the property, and the consignors could not divest them of such right ; but if, on the contrary, they should come to the conclusion that there was not such a contract, and that the acceptances were on the general credit of the consignors, then the latter had the right to change the destination of the property, and the jury would in that case find for the defendant. To which charge the defendant excepted. The jury assessed the value of the goods at \$3675, and found a verdict for the plaintiffs, with six cents damages and six cents costs. The defendant moves for a new trial.

S. Stevens, for the defendant.

M. T. Reynolds, for the plaintiffs.

**By the Court*, COWEN, J. It is barely necessary to state this [*173] case, in order to see that the question whether there was a consignment for a valuable consideration to the plaintiffs, was properly left to the jury ; and that they have rightly disposed of it. True, Ticknor testifies that there was no agreement by which the title was to pass ; but this is by no means conclusive. He could speak only to an express or direct agreement ; and so far he doubtless spoke correctly. It was for the jury to look at his own and the other evidence in the case, and collect the language of circumstances. The mere course of business between M. Ticknor & Co. and the plaintiffs for a considerable time previous to the consignments in question would have warranted them in saying that there was an intention to vest the title in the plaintiffs. That course was, for the plaintiffs to consign goods from time to time, and draw against them in the plaintiff's hands. After that the goods in question are consigned, received by the defendant at Troy to hold for the plaintiffs during winter, and put them in a way of transportation to New York at the opening of navigation in the spring. About the same time, as if to draw against these very goods, come the bills of exchange for \$6000. Comparing the dates of invoices, consignments and drafts, they must have appeared to the plaintiffs as specially designed to make parts of the same transaction. *Vide Virtue v. Jewell*, 4 Campb. 31 ; *Haile v. Smith*, 1 Bos. & Pull. 568. Add to this the obvious position in which the defendant stood, holding, as the jury had a clear ground for saying, in the very right of the plaintiffs, with full knowledge that the goods were directed to them ; and the idea of disturbing the verdict as against the weight of evidence is altogether inadmissible. The short inference is, that there was an agreement to consign these goods so as to raise a fund in the plaintiff's hands,

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on which the consignors might draw immediately. No matter whether the goods remained at Troy or had passed on to New-York. It was enough that the general property thus passed to the plaintiffs. The right of possession followed. So far as title is concerned, therefore, the action was [*174] well sustained at the circuit ; for "in the view I have taken, all pretence of right in Goddard is extinguished. The assignment to him was some weeks posterior to that under which the plaintiffs acquired title. The cases cited by the defendant's counsel, so far as they go to the question of title, have no application. *Ruck v. Hatfield*, 5 *Barn. & Ald.* 632. *Craven v. Rider*, 6 *Taunt.* 433. *Thompson v. Trail*, 2 *Carr. & Payne*, 334. They were all cases where the plaintiffs, the vendors, kept possession of the lighterman's receipt for the goods consigned, the vessel by which they were to be transported yet lying in the port of departure, the effect of which was that the masters, the defendants, held the goods for the vendors, and subject to their control. Yet without waiting for a surrender of such receipts, the masters signed bills of lading to the consignees. The latter failing to pay, the plaintiffs claimed a right to stop the goods *in transitu* ; and it was held they might. Signing bills of lading was held to be a conversion. But in the case at bar, the plaintiffs had not failed to pay ; they had accepted bills and were able to pay ; and the defendants, so far from holding for the vendors or consignors, held, according to the finding of the jury, for the consignees, the plaintiffs. *Patten v. Thompson*, 5 *Maule & Selw.* 349, therefore, has no application.

It is said there is no evidence in the case that the plaintiffs had either accepted or paid the drafts. There is not indeed any direct evidence ; but the fact of acceptance was assumed throughout the trial. The judge referred to it in his charge to the jury. It is strange, if such a material fact were out of the case, that it was not mentioned as an objection and made a point.

I have so far considered the consignment as in nature of a sale. But take it that the absolute property did not pass ; that there was not evidence enough to warrant the jury in saying that it did ; this answers only one view of the case. If the plaintiffs were not absolute purchasers, still they were factors or commission merchants *del credere*, who were in advance or under acceptance on the credit of the sattinets to their full value. Then the goods

[*175] are to be taken as delivered to the defendant to hold for the plaintiffs in that character. This comes to the same thing so far as their right of action is concerned. The plaintiffs had a *lien* with possession in themselves ; for the defendant's possession was theirs. The contract was not merely *executory* like that in the case cited by the counsel for the defendant. *Nichols v. Clent*, 3 *Price*, 547. It is true of that case, that the factor *del credere* had accepted bills against the goods, which were indeed designed for him, and were put on the way to him. But they did

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not come to his hands or the hands of his agent until after the consignor had committed an act of bankruptcy. The case goes entirely on the ground that the contract of sale was still unexecuted ; that the vendor himself had a right to stop the goods and substitute others to meet the consignees' acceptances. I shall only refer to the reasoning of Baron Graham who delivered the opinion of the court, p. 567, 570, &c., with the general declaration that, on his own principles, had the goods been delivered as the jury found they were here, he could have made no doubt that the right of the consignees for the amount of their acceptances would have become perfectly executed. He very ably reviews the previous cases, and among others *Kinlock v. Craig*, 3 *T. R.* 119, putting them on the correct ground. The plaintiffs, then, according to the finding of the jury, either had title as vendees or a lien as factors *del credere* for their advances, which is the same thing in effect, for the purposes of this action. I shall, therefore, consider them the same as vendees, for the purposes of all the other questions in the cause.

Several grounds of a technical character have been taken by the defendant in the course of the cause which it becomes necessary to consider.

The supposed variance between the declaration as stating a delivery to the defendant alone, and the proof as showing a delivery to him and his partner, which was objected at the circuit, is now abandoned.

But Nelson, the plaintiff, it is said showed no authority to demand the goods. The defendant's partner did not take the ground that Nelson had no title, and desire time to examine. "Had he done [*176] so, in good faith, and Nelson had refused all explanation, there might have been plausibility in objecting that he disclosed no right. Doubtless all the defendant could desire to know was, whether Nelson belonged to the N. Y. firm, for whom he had received the boxes. Probably not so much ; for, according to the subsequent explanation given by the defendant, he had taken his ground in favor of Goddard, who had most likely indemnified him. If not, it was the defendant's business to see to that. To constitute a conversion, it is said the refusal to deliver must be positive and absolute, not merely evasive. 2 *Saund. Pl. and Ev.* 478, 479, *Am. ed.* 1829. The remark is there illustrated by the case of *Severin v. Keppell*, 4 *Esp. R.* 156. This was trover against a silversmith, for plate delivered to him, for the purpose of having it repaired ; and the plate being repeatedly demanded, he finally, after several excuses for not delivering, and obtaining time, sent home a part, and on a demand being made for the residue, refused, saying he had already sent it home. This he knew to be false. Yet the plaintiff was nonsuited, Lord Ellenborough saying that where a man takes goods under a contract to deliver, the *bare non-delivery* is not to be considered as itself amounting to a tortious conversion. It is true, that a reasonable ex-

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cuse, made in *good faith*, ought not to be held a conversion. *Isaack v. Clark*, 2 *Bulstr.* 312, 313. Chief Justice Coke there laid down the law as it stands at this day. A finder or bailee of goods is not to be entrapped. If the finder excuse himself, as wanting time to ascertain the true owner, and, as Coke says, lay goods up and keep them *for that cause*, and *for the true owner*, to be delivered whenever the finder can reasonably satisfy himself of the man, this is no evidence of a conversion. So where the defendant found timber on his premises, which had, under permission of a former occupier, been deposited there by the plaintiff, and on his demanding it, the defendant told him he should have it, if he would bring any one to prove his property. *Green v. Dunn*, 3 *Campb.* 215, note. So where the defendant, a servant, had charge of a warehouse in which goods had [*177] been deposited, and on their being demanded of him, said he could not deliver them without an order from his masters. *Alexander v. Southey*, 5 *Barn. & Ald.* 247. Best, J. said, in the latter case, an unqualified refusal is almost always conclusive evidence of a conversion ; but if there be a qualification annexed to it, then the question is, whether it be a reasonable one. Bayley, J. said, if the plaintiff had informed the defendant that application had been made to his masters, and they had refused, or that he expected the defendant to go and get an order, and after that he had refused, he thought that would have amounted to a conversion ; but here he would not have done his duty, if he had delivered the goods without an application to his employers. Holroyd, J. compared it to calling on a servant at a gentleman's house, for goods, and the servant delaying for orders. He cited *Mires v. Solebay*, 2 *Mod.* 242, as in point. So, if the demand be not made by the owner, and the refusal be put on the ground of not knowing the owner ; and therefore the goods be kept till he can be ascertained, or if the defendant objects a want of power to make the demand, and desire a delay till he can be satisfied on this head. *Solomons v. Dawes*, 1 *Esp. R.* 83, and *vide Coore v. Callaway*, *id.* 115. So of any reasonable excuse made in good faith at the time, the goods being evidently kept with a view to deliver them to the true owner. It is, then, the business of the plaintiff to obviate the objections, as far as may be reasonably required. The course a defendant should pursue under this, or the like circumstances, is well considered by several American cases. *Jacoby v. Laussatt*, 6 *Serg. & Rawle*, 300, 305. *Watt v. Potter*, 2 *Mason*, 77, 81. *Ratcliff v. Vance*, 2 *Rep. Const. Ct. S. C.* 239, 242, 243. In the case at bar, the refusal was not by a servant, but by the defendant's partner. It is the same as if demand had been made of the defendant personally, and he had said "no ; I must have time," without saying why ; concealing the fact that Goddard had interposed a claim, and that he had given a receipt to hold for him. We do not agree that the refusal of the silversmith on the fraudulent ground

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stated in *Severin v. Keppell*, was such an evasion as the law allows. It was not a bare non-delivery which we concede is not evidence of a conversion where the goods came lawfully into the hands of the defendant. Nor can we accede that it was a reasonable evasion in *good faith*, which all the cases require, from *Bulstrode* to *Barnewall & Alderson*. Refusal upon a ground false or deceptive is equivalent to a general refusal, which, as Best, J. said, is, in general, conclusive evidence of a conversion. Had D. Wight & Co. the defendant's firm, kept the question of Goddard's title open, and George Wight had desired time to be satisfied whether the plaintiffs had a prior title, doubtless an explanation of that matter would have been given. But the firm had actually signed a receipt acknowledging to hold for Goddard. This was in itself a conversion. *Craiven v. Ryder*, 6 *Taunt.* 433. *Ruck v. Hatfield*, 5 *Barn. & Ald.* 682. *Thompson v. Trail*, 2 *Carr. & Payne*, 334; 6 *Barn. & Cress.* 36, S. C. George was a party to the receipt. That he concealed; the lien for storage and premiums was concealed; and a claim interposed for time to consult, without calling Nelson's attention to any possible difficulty in the matter.

One word farther as to the objection taken on the argument, that a refusal by George Wight would not be evidence of a conversion by the defendant. That was on the assumption that George was a mere clerk. In fact, as I have said, he was a partner; and, without conceding that a refusal by a clerk would not be evidence, it is enough to say, that on the clearest principle, and on direct authority, where goods are received by partners, a demand of and refusal by one, equally affects the other. *Nisbet v. Patton*, 4 *Rawle*, 120, and the cases there cited.

Although this is an action of replevin in the detinet, we have chosen to follow the counsel on the argument, and treat it as an action of trover. We have therefore looked to see whether enough was proved to establish a conversion. In this sort of action, however, which merely goes for a wrongful detention, 2 *R. S.* 430, 2d ed. § 1, *id.* 435, § 36, the ground of action may not always be precisely the same, as if trover had been brought. It seems to bear a nearer resemblance to detinue, where the requisite evidence may not "in every case be so strong as would be necessary [*179] to make out a conversion. All three of the actions, however, no doubt depend on very nearly the same evidence, both for the prosecution and defence, where the receipt of the goods was originally lawful. The ancient distinction taken by Coke, 2 *Bulstr.* 313, that refusal may be a ground for detinue, where it will not maintain trover, is very nearly if not quite exploded by the modern authorities.

It seems to me, that the ground on which the defendant, by his partner, confessedly held on the goods, puts the question of lien out of the case. The defendant had forfeited all claim to the lien by tampering with the title. He

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had notice of Goddard's claim ; and if I may so say, attorned to him. It is like the case of one selling or pledging the goods. 2 *Wheat. Selw.* 1408. to 1412. and cases there cited, ed. of 1839. *Scott v. Newington*, 1 *Mood. & Rob.* 252. Either operates as a forfeiture of his lien, if the act be not in itself a conversion. Taking the evidence and the course of the defence together, there could be no doubt that the defendant had completely identified himself with Goddard, and held and defended on this title alone. A tenant who has attorned to another loses his right as tenant, and cannot afterwards claim to defend for want of a notice to quit. The rule seems to be much the same in respect to the lien holder. He must not do any positive act hostile to the claim of the owner. 2 *Wheat. Selw.* 1408, ed. of 1839.

Again, the sale or pledging of goods by a bailee is in itself a conversion. No demand would be necessary in trover, nor do I believe it would in replevin, although the declaration must, by § 36 of the statute, aver a request in all cases of wrongful detainer. A request is considered as made by bringing an action where there is a precedent duty to deliver. Is not the co-operating with a third person, receipting from and holding for him, equivalent to a pledging of the goods ? The case at bar, whether the defendant's acts in conjunction with Goddard be looked at, either in reference to the question of waiving the lien or a positive conversion, will be found to have been decided in principle, and almost in circumstance, by *Thompson v. Trail*,

[*180] 2 *Carr. & *Payne*, 155 ; 6 *Barn. & Cress.* 36, S. C. *Vid.*

also *Ruck v. Hatfield*, 5 *Barn. & Ald.* 632 ; and *Craven v. Rider*, 6 *Taunt.* 433. These cases all decide that where a bailee holding goods for the vendors, signs a bill of lading in favor of the vendees, this act is itself a conversion. The principle is directly applicable. Here the defendant holding the goods for the plaintiffs gives a receipt acknowledging to hold them for Goddard, who had no title. But if this were not so, and supposing the question of lien to rest on what the defendant's partner said when the demand was made, omitting to mention a lien and taking other ground, waives it. Without denying Nelson's right, without a reasonable excuse for delay, and without any allusion to the lien, George Wight said the goods could not be delivered till the defendant was himself consulted. Was not this, of itself, taking such ground independent of the lien as brings the case within *Boardman v. Sill*, 1 *Campb.* 410, note, which has been followed by this court ? *Everett v. Saltus*, 15 *Wendell*, 474. These cases hold that if the defendant claim the goods as his own, he waives his lien. The reason, as given in the first case, was, that the party answering claimed the goods on a ground distinct from the lien. George Wight here, who stood in the same condition as the defendant, says the sattinets cannot be given up till the latter is consulted. How was that at all consistent with the lien ? George knew of the lien, or must be taken to have known. What need then of de-

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laying and baffling? Why not say at once, I must have the money? *Boardman v. Sill* was reviewed and approved in *White v. Gainer*, 9 *Moore*, 41; 2 *Bing.* 23. *S. C.* There a dyer and miller, who had a lien, being applied to for the goods, answered that he might as well give up every transaction of his life. The court held that this was not taking ground distinct from the lien; but was no more than a general refusal, which will not work a waiver. Indeed Best, C. J. thought the words rather intimated that the lien must be paid. But the case at bar cannot be called one of general refusal: that is where no specific reason whatever is given. Here it is distinctly because the defendant was absent, a thing which was apparently unconnected with any claim of the lien. If it were otherwise, [*181] the defendant's partner could easily have said so. It is impossible, however, for two minds to differ on what was really meant. The whole pointed to the defence made at the trial, which set up a title adverse to that of the plaintiffs. George refers to the defendant as the man who must be consulted, and the first we hear of him is an avowal that he had been holding on for Goddard.

A new trial should be denied.

THE PEOPLE, *ex relatione* TRAVER, vs. THE SUPERVISORS OF THE COUNTY OF DUTCHESS.

A county clerk is not entitled to compensation for continuing general indexes of the names of grantors and grantees, mortagors and mortgagees contained in the books of records in his office of deeds and mortgages.

DEMURRER to a return to an alternative *mandamus*. The alternative writ required the defendants to audit, and allow the relator's account, as late clerk of the county of Dutchess, for making general indexes to the deeds and mortgages recorded in that county, from 1832 to 1838, pursuant to the *statutes of 1826*, p. 359, ch. 313. On the return to the alternative writ, it appeared, that the relator was clerk from the 1st day of January, 1829, to 1st January, 1838. In February, 1829, the court of common pleas of Dutchess made an order, in pursuance of the act of 1826, requiring the relator to provide books and make the general indexes contemplated by that act. The relator complied with the order, and made the indexes up to 1st January, 1832, for which the supervisors allowed and paid him \$950, in addition to the expense of stationery, binding, cutting and preparing books. The relator afterwards continued the general indexes, by entering the deeds and

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mortgages recorded for the time being, from January 1st, 1832, to the end of his term on the 1st January, 1838. For this last service he presented an account to the supervisors, at their annual meeting in November, [*182] 1838, amounting to \$580, but the board refused to allow any thing. There had been no new order by the court of C. P. after the order made in 1829. The relator demurred to the return, and the defendants joined in demurrer.

S. Barculo, for relator.

D. V. N. Radcliff, for defendants.

By the Court, BRONSON, J. It was formerly the practice to make an index to each volume of the county records ; and that course is still required by law, 2 R. S. 286, § 61, though it may, perhaps, be dispensed with in those counties which have procured general indices under the act of 1826. The old mode has in fact been dispensed with in the county of Dutchess since the general indices were completed at the end of the year 1831. After that period, the relator, when he recorded a deed or mortgage, omitted making an index in the particular book, and made the proper entry in the general index. This cost him no more labor than the old mode ; and it rendered the searches much more convenient, both for him and the public. He has not done the same thing twice, or in two forms—once under the general law, and again under the act of 1826—and in an equitable point of view, the supervisors acted very properly in rejecting his claim.

But I shall not place my opinion upon that ground. If he had continued the index in each volume of records after the year 1831, the charge for continuing the general indices after they had once been completed, could not be allowed. By the act of 1826, it was made the duty of every county clerk, whenever directed by the court of common pleas of the county, to provide proper books for making general indices of all deeds and mortgages recorded or registered in his county, and to index in alphabetical order all such deeds and mortgages. The indices of deeds and mortgages were to be entered in separate books, and sufficient room was to be left to make further entries from time to time ; “ and when the said indices shall be so completed,” [*183] the board of supervisors of the county were to audit and pay the account of the clerk for services and expenses. There was a proviso that the act should not extend to any county where such indices had already been provided. *Statutes of 1826*, p. 359. The act was amended the next year, *Statutes of 1827*, p. 203, § 3, but the amendment does not affect the present question. The relator made and completed the general indices for his county, in pursuance of the order of the court directing it to be

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done, and was paid for his services and expenses pursuant to the statute. The act of 1826 had then performed its office, so far as it related to the county of Dutchess. It contained no provision for a second order by the court of common pleas, and none was in fact made. In *continuing* the general indices after they were once *completed* according to the statute, the relator undoubtedly acted with reference to his own convenience in making searches, and has had his compensation in the fees allowed by law for those services. If he has done more than his duty, he acted voluntarily, and has no legal claim upon the county for compensation.

The relator's counsel thought it important to notice that the act of 1826 was not repealed in the general revision of the laws in 1830. In relation to those counties which had already procured general indices, the act had answered the end for which it was made, and there was no occasion for repealing it; and in relation to other counties, the act was properly left in force, to the end that general indices might be provided whenever the county court should so direct. The omission to repeal the statute does not prove that the legislature intended the clerks should be paid for *continuing* general indices which had already been made.

It is of course unnecessary to consider the other questions which were mentioned on the argument.

Judgment for defendants.

*GILLET vs. HUTCHINSON'S ADMINISTRATORS.

[*184]

In an action against an *administrator*, the plaintiff cannot join a count on a *promise by the intestate* with counts on *promises by the administrator for causes of action accruing since the death of the intestate*; a promise by the administrator on an *account stated* of moneys due from the intestate in *his life time* may be joined with a count on a promise by the intestate, but not a promise by the administrator on an *account stated* of moneys due from himself.

MISJOINDER of counts. The declaration in this case contains several counts. In the *first*, the plaintiff declares on a promissory note dated October 1, 1836, made by John W. Dygert for \$300, payable one year after date to the order of the *intestate*, and endorsed by him in *his life time* to the plaintiff; averring a demand, and non-payment by the maker when the note fell due, and notice to the defendants as administrators, the *intestate* being then dead, and then stating a promise by the administrators to pay the note. The *second* count is on a like note, omitting averment of notice of non-payment. The *third* count is for money *lent* by the plaintiff to the de-

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fendants, as administrators. *Fourth*, for money *paid &c.* by the plaintiff to and for the use of the defendants, administrators as aforesaid. *Fifth*, for money *had and received* by the defendants, administrators as aforesaid, to and for the use of the plaintiff. *Sixth*, for that the defendants, administrators as aforesaid, *accounted together* with the plaintiff of and concerning divers sums of money before that time due and owing *from the defendants*, administrators as aforesaid, to the plaintiff, &c. Demurrer and joinder.

J. A. Spencer, for defendants.

J. V. L. Pruyn, for plaintiff.

By the Court, BRONSON, J. Independant of minor objections, there is a fatal misjoinder of counts. The two first counts are on promises [*185] made by the intestate in his life **time*, though the right of action did not accrue until after his death. On these counts the judgment would be *de bonis intestatoris*; although a promise by the administrators is alleged, the counts show that the original obligation was contracted by the intestate. *Carter v. Phelps*, 8 Johns. R. 440. The four remaining counts are on promises made by the administrators, and relate wholly to transactions after the death of the intestate. On these counts, the judgment would be *de bonis propriis*. As to the *money counts*, vid. *Rose v. Bowler*, 1 H. Black. 108. *Bridgen v. Parkes*, 2 B. & P. 424. *Powell v. Graham*, 7 Taunt. 580. *Jennings v. Newman*, 4 T. R. 347. 2 Saund. 117, e. note. *Myer v. Cole*, 12 Johns. R. 349. *Demott v. Field*, 7 Cowen, 58. The count upon an account stated, might have been joined with the two first counts, if the accounting had been of moneys due from the *intestate* in his life time; but it is of moneys due from the *administrators*. *Reynolds v. Reynolds*, 3 Wend. 244. The case of *Powell v. Graham*, 7 Taunt. 580, so far as it relates to the *insimul computassent* count, is not law in this state, if it is in England.

Beyond the misjoinder, the second count is bad, for not averring notice of demand and non-payment of the note; and the other counts are not very formally drawn.

Judgment for defendants.

NEIL vs. ABEL & ANNAS.

Where a cause was tried in a justice's court, and the justice at the request of the jury, after they had retired to consider of their verdict, gave them, without the consent of the parties,

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his minutes of the trial, the common pleas on *certiorari*, reversed the judgment rendered on the verdict of the jury, and this court, on *writ of error*, affirmed the judgment of the common pleas.

ERROR from the Tompkins common pleas. *Neil* sued *Abel & Annas*, before a justice, upon contract, and on a trial by jury, recovered \$25, and costs. On *certiorari*, from the common pleas, the justice returned, among other things, "that after the jury had retired under [*186] the charge of a constable, to deliberate on their verdict, and had been out some time, the constable attending them came to him and requested that the jury might have the minutes of the trial which had been kept by him, (the justice,) saying it was the request of the jury, whereupon the justice, without consulting the parties, handed his minutes to the constable. About five minutes afterwards, the plaintiff's counsel asked the justice if the jury had the minutes, and the justice thereupon related to the counsel of both parties what had been done. The counsel answered, that it was improper to give the minutes to the jury, without the consent of the parties. The justice thereupon immediately went to the door of the jury room and demanded of the constable the minutes, which were immediately handed to him. The justice did not go into the room, nor speak to the jury. The jury afterwards rendered their verdict for the plaintiff. The common pleas reversed the judgment on the sole ground "that the justice improperly permitted the jury to have the use of his minutes." The plaintiff now brings error.

S. Crittenden, Jr. for plaintiff in error.

H. D. Barto, for defendant in error.

By the Court, BRONSON, J. It has always been the policy of the law to watch over the deliberations of the jury with great care, and scrupulously to guard them against any extraneous influences. Many of the cases on this subject are collected in *Trials per paes*, 247, ch. 12, Co. *Litt.* 227, (b) and *Cowen's Treatise*, 541, 543.

In general, the jurors cannot take with them, when they retire to deliberate, any thing but records and sealed instruments, without the consent of parties. But if they take an unsealed paper without reading it, that will not avoid the verdict. *Hacklie v. Hastie*, 3 Johns. R. 252. The fact that the paper taken by the jury in that case was not read, was proved by the oaths of three of the jurors. Had "it not been proved, [*187] the verdict would, I think, have been set aside.

The justice gave the jury his minutes or notes of the trial, and the case is much like those in which the jurors have re-examined a witness, or conferred with the justice in relation to the evidence, or some other matter, after they

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had retired to consider of their verdict. In *Metcalf v. Deane, Cro. Eliz.* 189, after the jurors had gone from the bar they called one of the witnesses sworn on the trial, who "recited again his evidence to them," and it was held that the verdict was not good. *Buller* says, if they examine witnesses by themselves, though the same evidence that was given in court, it will avoid the verdict; but they may come back into court to hear the evidence of a thing whereof they are in doubt. *Bull. N. P.* 308, ed. of 1806. In *Bunn v. Croul*, 10 Johns. R. 289, the jury, while deliberating, requested the justice to inform them whether a particular point of evidence had been given; the justice answered that it had been given, and mentioned the witness who had testified to the fact. This was held a sufficient ground for reversing the judgment. The court said, the allowance of such a practice would be dangerous to the rights of parties. The recollection of the justice might not be accurate as to what the witness had said—the testimony might be misstated, when, if the parties were present, or the witnesses again called to repeat their testimony, any mistake might be corrected. These remarks apply with equal force to the minutes of testimony kept by the justice, which are usually very imperfect. In *Taylor v. Botsford*, 13 Johns. R. 487, the judgment was reversed, because the justice went into the jury room to answer certain questions proposed to him by the jury, without being accompanied by the parties; and it was held not enough that the plaintiff in error knew the justice was going in, and made no objection.

There is no room in this case for referring the consent of the parties to the delivery of the minutes to the jury. And besides, in *Taylor v. Botsford*, it was said by the court, that the consent ought not to be matter of inference; it "ought to appear affirmatively, that it was done with the consent of parties."

[*188] The common pleas were right in holding this to be a fatal error.

Judgment affirmed.

DIXON vs. CLOW.

Where a party had an easement in the land of another, viz. the right to cut a ditch or water-course, it was held that the owner of the land had the right to erect fences across the water course, and that if the other unnecessarily or wantonly removed them, he was liable in damages, and that the owner, for such removal of the fences, was entitled to recover, though no actual damage was proved. Every unauthorized entry upon the land of another is a trespass for which an action lies, though the damages be merely nominal.

ERROR from the Cayuga C. P. *Dixon* brought trespass *quare clausum fregit*, against *Clow* in the court below, and declared for breaking and

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entering his close on several occasions, pulling down his fences, &c. On the trial the defendant justified under a grant for a ditch or water-course over the plaintiff's land. On the 22d April, 1832, the plaintiff, by deed, for the consideration of \$200, conveyed in fee to one *Garlick*, whose title the defendant had subsequently acquired, a piece of land in the town of Brutus, 100 feet long and 70 feet wide, together with the right and privilege of taking the water from the Cold Spring brook which ran through the plaintiff's farm, for the purpose of carrying water works to be erected on the piece of land granted. The water was to be carried about half a mile over the plaintiff's land, in a canal to be constructed for that purpose, not more than six feet wide at the bottom. The course of the canal was specified, and at one point there was to be a dam for the purpose of turning the water. The grant was made subject to the rights of the state in a feeder to the Erie canal. In the spring of 1838 the defendant entered and constructed about twelve chains in length of the canal or ditch, making it about three feet wide at the bottom, and built a *dam by which the water [*189] was turned into the ditch, and on two or three occasions he threw down the plaintiff's fences and opened, and exposed his field to the road. He removed four lengths of fence at two places where the fence passed across the site of the ditch, and this at a time when he did not enter with teams. In the summer of 1838 repairs were made; and the defendant through the season went almost daily to the dam to shut the gate and regulate the flow of the water. Evidence was given tending to show that the defendant had exceeded the authority conferred by the grant; but the plaintiff did not show that he had sustained any particular amount of damages. The plaintiff requested the court to instruct the jury, 1. That the grant only gave the right to enter on the plaintiff's land for the purpose of digging and repairing the ditch; 2. That the plaintiff had the right to include the ditch in fencing his fields, and that the defendant had no right to remove the fences except when it was necessary to enter with teams, restoring the fences again when the repairs were made; 3. That the defendant had no right by the grant to an open way along the water course; and 4. That the court had a right to presume damages from the acts proved. But the court refused so to charge; and instructed the jury, that they doubted much whether the jury could find a verdict for the plaintiff, when he not only had not proved *any sum* as damages in consequence of the defendant's acts, but after being enquired of by the court whether he intended to prove *the amount* of his damages, his counsel answered that he did not intend to offer any proof of *the amount* of damages. On the subject of the grant, the court charged, that Garlick and his assigns had the full right to enter upon the premises described in the deed, along the course of the ditch, for constructing and repairing the same, and that the plaintiff had no right to build any fence that should

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run across the bank and the ditch, thereby obstructing the defendant from free access to the ditch up and down the same, for the purpose aforesaid ; that if he had a right to build any fence, he might bulid a stone wall, and then the defendant could not get to his ditch to repair ; that the [*190] defendant had a right to go along the line of his ditch without obstruction for the purpose aforesaid. To the charge, and to the refusal to charge as requested,he plaintiff excepted. The jury found a verdict for the defendant, and the plaintiff now brings error.

J. Porter, for plaintiff in error.

A. Gould, for defendant in error.

By the Court, BRONSON, J. The defendant has an easement in the plaintiff's land, and must be allowed to enjoy it in such a manner as will secure to him all the advantages contemplated by the grant. But he must so use his own privileges as not to do any unnecessary injury to the plaintiff. It is evident from the prior right of the state, the small amount of consideration in the deed, and the capacity of the ditch, so far as it has been constructed, that only a very small quantity of water was to be conducted over the plaintiff's land ; and that the "water works" or machinery to be erected on the defendant's lot were of no great extent or importance. I cannot think that a reasonable construction of this grant, which in effect, gives the defendant an unobstructed right of way along the ditch, and compels the plaintiff either to throw open his fields, or to erect a fence on both sides of the canal for the whole distance of half a mile that it passes over his land. If the plaintiff may include the ditch in his fields, by extending across the banks a fence which can easily be removed in case of necessity, it does not follow that he can build a stone wall which will wholly exclude the defendant from his water course. The court held that the plaintiff had no right to build any fence that should run across the bank. I cannot see that this is a necessary conclusion of law on the facts detailed in the bill of exceptions. The case should, I think, have been submitted to the jury to say, whether the acts of which the plaintiff complains were necessary to the enjoyment of the defendant's privileges, or whether he acted wantonly, and did an unnecessary injury to the plaintiff.

II. If the plaintiff succeeded in showing an unlawful entry [*191] "upon his land, or that his fences or any portion of them were improperly thrown down and his fields exposed, he was entitled to a verdict for nominal damages at the least. It was not necessary for him to prove a *sum*, or that any particular *amount* of damages had been sustained ; and the charge was in this respect improper. From the pleadings and the course of the trial, it is evident that the action was brought for the pur-

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pose of trying the extent of the defendant's right. It is suggested, and is probably true, that a suit was first commenced in a justice's court, where the defendant pleaded title, and thus made it necessary for the plaintiff to sue in the common pleas. But however that fact may be, every unauthorized entry upon the land of another is a trespass, and whether the owner suffer much or little he is entitled to a verdict for some damages.

Judgment reversed.

J. & J. FREELAND vs. SOUTHWORTH.

As between a *vendor* and *vendee* of land upon which there was a dwelling house without a fire-place, and without a chimney except from the chamber floor, IT WAS HELD, that a *stove* from which went a pipe into the lower end of the chimney was not a *fixture*, and did not pass with the land to the purchaser.

ERROR from the Tompkins common pleas. *Southworth* brought an action of trespass before a justice against the two *Freelands*, for taking and carrying away a *stove* and *pipe*; and on a trial, judgment was rendered for the plaintiff, which the defendants removed into the common pleas by *certiorari*, where the judgment was affirmed, and the defendants now bring error. The sole question on the trial was, whether the stove, as between the vendor and vendee of real estate, was a fixture and passed to the plaintiff as a purchaser. The facts were undisputed. One of the defendants sold and conveyed to the plaintiff a farm on which there was a dwelling house, and agreed to give possession soon afterwards. There was no fire-place in the house, and no chimney, except from the chamber floor upwards. The [*192] pipe went directly upward from the stove into the lower end of the chimney, where it was fastened by putting pieces of bricks around it. The defendants removed the pieces of brick and took down the stove pipe, without doing any damage to the chimney, and carried away the property. Before the justice and in the common pleas it was held that the stove and pipe passed to the plaintiff by the deed.

Freer & Love, for plaintiffs in error.

H. S. Walbridge, for defendant in error.

By the Court, BRONSON. We have recently had occasion to examine this subject very much at large, in a case between tenants in common on a partition of their property; and it would be useless to review the numerous cases in relation to fixtures a second time. *Walker v. Sherman*, 20 *Wendell*, 636. I think the stove and pipe were not affixed to the freehold, and

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did not pass by the conveyance of the land to the plaintiff. It is not alleged that the stove was fastened to the building in any manner whatever, and the temporary fastenings about the pipe were such as could be removed without the slightest injury to the chimney. In *Goddard v. Chase*, 7 Mass. R. 432, on which the plaintiff relies, the stoves were set in the chimnies so that it was necessary to pull down the fire-places to get them out. Stoves put up in such a manner that they can be removed at pleasure, and without injury to the building, have never been considered a part of the freehold in this state. *See 2 R. S. 367, § 22, and p. 83, § 9, 10.*

It is said, that although a stove put up in the manner this was, would not, under ordinary circumstances, pass with the freehold ; yet, as there was no fire-place in the house, the stove was a necessary part of the building, and must have been so designed by the builder. The fact that there was no fire-place, only proves that the building was less perfect than it might [*193] have been made. It has, I think, no tendency to prove that the stove was a part of the freehold. The same mode of reasoning would go far to show, that bricks prepared for the construction of a chimney, if that were wholly wanting, would pass with the house ; or, if there had been neither stove nor fire-place, that the iron bake kettle, used as a substitute, would be a fixture. It is very probable that the builder supposed a stove would be used instead of a fire place ; but if he did not put up a stove and make it part of the house, his design can have no influence upon the question.

I see nothing to distinguish this from the ordinary case of stoves put up in such a manner that they can be removed and replaced, or others substituted, at pleasure, without in any way impairing the building. The stove was a part of the furniture of the house, which the vendor had a right to remove with his other goods.

Judgments reversed.

REYNOLDS vs. REYNOLDS.

Since the revision of the laws in 1830, where a husband dies, his widow is entitled to dower in the lands whereof he was seised, notwithstanding that previous to 1830, for many years she lived in open adultery away from him, if a divorce was not obtained. Had the husband died previous to 1830, she would have been barred under the *act concerning dower*, passed in 1787, notwithstanding a divorce had not been obtained ; but that act having been repealed, the widow now by the *revised statutes* is not barred, unless the marriage contract has been dissolved by a divorce.

Previous to the death of the husband, the wife had no right, interest or estate in the lands of her husband which could be forfeited by the adultery ; and therefore, the act of 1787 had no operation in barring her dower.

THIS was an action of *ejectment for dower*, tried at the Essex circuit in January, 1839, before the Hon. JOHN WILLARD, one of the circuit judges.

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The case, as the plaintiff offered to prove it, was this : She was married to *Newell Reynolds* in 1800, and they lived together as husband and wife for about two years, and until after they had one child, which is now living. In 1802 [*194] the plaintiff left her husband, for the reason that he was guilty of criminal intercourse with other females in his dwelling house, and treated her in other respects with so much neglect, ill temper and cruelty, as rendered it proper and necessary for her to leave him. Within two years after the plaintiff left, Reynolds took the defendant into his house, pretending to have married her, and continued to cohabit with her as a wife until the time of his death in 1837, having a large family of children by her. About the year 1805, and about one year after Reynolds commenced cohabiting with the defendant, the plaintiff, supposing herself absolved from the marriage contract, married one *Haskins*, and continued to live with him as his wife about twenty years, when he died. All the parties during the whole time lived within a few miles of each other. Reynolds, the husband, was seized and possessed of the land in question after his marriage with the plaintiff, and lived on it for many years, before and at the time of his death in 1837. Since that time, the land has been occupied by the defendant. The defendant insisted that these facts, if proved, would not authorize a verdict for the plaintiff, because she had forfeited her claim to dower by separating from her husband, and living in adultery with another man. The judge so ruled, and nonsuited the plaintiff, who excepted, and now moves for a new trial.

G. Stow, for plaintiff.

A. C. Hand, for defendant.

By the Court, BRONSON, J. Adultery in the wife was, at the common law, no bar to her claim for dower, not even where a divorce followed, unless it was a divorce *a vinculo*. 2 Inst. 435. Co. Litt. 32, (a), and note 194. 2 Black. Comm. 130. 4 Kent's Comm. 52, note (c), 54. But by the statute Westm. second, 13 Ed. I., ch. 34, it was enacted, that "if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be [*195] convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him ; in which case, she shall be restored to her action." 2 Inst. 433. This statute was, in substance, re-enacted in this state in 1787, 1 Greenl. 294, § 7 ; and it remained in force down to the revision of the laws in 1830. 1 R. L. of 1801, p. 58, and 1 R. L. 58. Under this statute, there can be

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little doubt that the plaintiff forfeited her claim to dower, by living in adultery with Haskins, without being afterwards reconciled to her husband.

The provocation which she had to depart will not aid her. The words of the statute Westm. 2, are, “if a wife *willingly* leave her husband, *and go away, and continue,*” &c. Lord Coke, in his commentary, says : “ Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not *sponte*, but against her will, but after consent, and remain with the adulterer without being reconciled, &c. she shall lose her dower ; for the cause of the bar of her dower is, *not the manner of her going away, but the remaining with the adulterer in avowtry, without reconciliation ;*” and so if she go away with her husband’s consent and agreement with another man, and afterwards commit adultery, she shall be barred. And Coke cites what he calls “ a rare and strange case,” from the parliament roll, 30 Ed. I., which was only seventeen years after the statute was passed. In that case, John de Camoys, by deed, delivered and committed his wife Margaret to the Lord William Paynel, and did grant and confirm that the said Margaret should be and remain with said Lord William according to his will. After the death of her husband, the wife demanded her dower, but it was adjudged against her, on the ground of the adultery with Paynel. 2 Inst. 435. Dyer, 107 (a), note. Bacon’s Abr. Dower, F. In Coot v. Berty, 12 Mod. 232, in dower, the defendant pleaded the elopement of the wife ; she replied, that the husband had bargained and sold her to the adulterer ; but the replication was held bad. In the recent case of *Hethrington v. Graham*, 6 Bing. 185, it was held that adultery was a bar, [*196] *although committed after the husband and wife had separated by mutual consent. Tindal, Ch. J. concludes a review of the authorities, by saying that they “ place the forfeiture of the dower upon the fact of a *living from the husband in adultery, and not upon the circumstances of the elopement.*” I do not find that this doctrine has been departed from.

Although the plaintiff had good cause for leaving her husband, yet the subsequent adultery, had the husband died while the act of 1787 remained in force, would clearly have barred this action for dower. The effect of the present statute upon her claim remains to be considered.

In 1830, the act of 1787 was repealed and after declaring that a widow shall be entitled to dower, a new provision was made in the following words : “ In case of divorce dissolving the marriage contract, for the misconduct, of the wife, she shall not be endowed.” 1 R. S. 741, § 8. Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This has brought us back to the common law, as it stood before the statute of 13 Ed. I., for as we have already seen, adultery did not work a forfeiture at the common law. And as to a divorce *a vinculo*,

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that always put and end to the claim of dower ; for although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue until the death of the husband. *Co. Litt.* 32, (a.) 2 *Bl. Comm.* 130. 2 *Kent's Comm.* 52, (c.) and p. 54. The statute bar for the mere act of adultery, which had existed for more than five centuries and a half, was blotted out by the repeal of the act of 1787—the British statutes not being in force in this state ; and the 8th section of the act of 1830 has added nothing to the law as it would have stood had the legislature stopped with a simple repeal of the act of 1787.

How, then, stands this case ? Prior to 1830, the plaintiff was under a statute disability, and had her husband died at that time she could not have taken dower. But seven years before the death of her husband, the disability was removed by the repeal of the statute—there was no longer any bar, and I am unable to discover any valid objection *to [*197] her claim. She is able to establish all the elements of a perfect title to dower, to wit, a lawful marriage, and the seisin and death of the husband. The objection urged against her is, there was a time when if your husband had died, you would not have been entitled to dower. To this she may well answer, true it is, there was such a time, but it has gone by, and when my husband died, there was no legal bar in my way. The law says, a widow shall be endowed, unless there has been a divorce for her misconduct ; there has been no such divorce in my case, and I am a widow and claim my right. Her argument rests, I think, on a solid foundation.

It is not very important whether we regard the late revision of the statutes as working a simple repeal of the act of 1787, and thus reviving the ancient common law ; or whether we regard it as a repeal, accompanied by a new provision : for in either case, the mere fact of living in adultery ceased to be a bar to dower in 1830, and the husband did not die until 1837. There had been no divorce, and there was at that time no obstacle in the way of the plaintiff's claim.

The defendant's answer to this view of the case is, that the plaintiff had a *right, interest or estate* in the land in the life time of the husband, which was forfeited by the adultery prior to 1830 ; and we are referred to the saving clauses in the repealing statute. 2 *R. S.* 779, § 5, 6. The argument assumes what cannot be maintained. While the husband lives, the wife has no right, interest or estate in the land. She has nothing but a mere capacity to take, in the event of her surviving her husband—she is *dowable*. It is not until she becomes a widow, that she is entitled to dower. It was the *widow*, not the *wife*, who was provided for by *magna charta*. 9. *Hen. III.* ch. 7. 2 *Inst.* 16. And so it has always been in our statutes concerning dower. 1 *R. L.* 56, ch. 4. 1 *R. S.* 740. The legal assurance that the

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wife shall have dower if she become a widow, is sometimes spoken of, through the imperfection of language, as though it were a present estate or interest in the land ; but, in truth, it is not so ; she has no right, until af-
[*198] ter the death of her "husband. In *Lampet's case*, 10 Co. 49,

Lord Coke, although he was endeavoring to prove that the wife might be barred by a fine, was forced to admit that, " notwithstanding her husband is seized in fee, and the marriage is lawful, yet she has but a *possibility* of dower till the death of her husband."

It was this difficulty that puzzled the old lawyers. Although they were resolved that a fine levied by the husband and wife, or by the husband alone in certain cases, should bar the widow of her dower, they were at a loss to discover any good reason for their judgment. Some of the earliest cases held that a fine was no bar : and such was the opinion of Plowden, as given in his report of the case of *Stovel v. Lord Zouch*, which was adjudged in 11 Eliz. Plow. Comm. 373. He says, "in the case of dower, the title is *wholly* accrued after the fine, viz. *by the death of the husband*, for until his death no title was consummate, nor wrong done by the conusee in detaining the land from the wife. And the other two points [marriage and seisin] are of no moment without the third, viz. the death of the husband." He insists, that the wife had no *right* to be barred, at the time of the fine levied. Lord Coke, who prides himself upon being able to give a reason for every thing, attempted to answer Plowden ; and he says : " Although at the time of the fine levied, her title was not consummate, yet the law respects the first and original causes, *scil. marriage and seisin.*" *Bingham's case*, 2 Co. 93. Now this is plainly no answer to the fact, which he does not deny, that the wife had no right or title at the time of the fine levied. He afterwards repeats the same idea, in different language, in *Lampet's case*, 10 Co. 49. His words are, " the intermarriage and seisin are the fundamental causes of dower, and the death of the husband but as an execution thereof." He might have carried his retrospect somewhat further, and gone back to the birth of the wife, or even to the creation of the world ; for those events must be ranked among " the first and original," or " the fundamental causes of dower," as well as " marriage and seisin." But neither [*199] the one nor the other, nor all of them together, conferred "any title on the wife. That accrued on the death of the husband. His lordship, as though not quite satisfied with his own reasoning, proceeds to show, that the opinion of Plowden, as was no doubt true, had been overruled ; and then concludes with the remark, that " now, common experience, without contradiction, is against it." The whole matter evidently comes to this : the woman is barred of her dower by a fine, because the courts have so adjudged ; and not on the ground that she had any interest or estate in

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the land upon which the fine could operate at the time it was levied. So in this and most of the other states, if the wife unite with her husband in aliening the land, by deed acknowledged, although that is not a mode in which a feme covert could act at the common law, she will be barred of her dower. She may also alien her own lands in the same way. How this happens to be the rule has never been very satisfactorily explained. *Parsons*, chief justice, thought it depended on *immemorial usage*, or a kind of New-England common law. *Fowler v. Shearer*, 7 Mass. R. 14. And in this state, it is said to depend on an *ancient practice*. *Bool v. Mix*, 17 Wendell, 128, 129. Probably no one can give a better reason why a widow shall not have dower after a fine levied, or deed acknowledged, than that which was given by Lord Coke in his answer to Plowden—"common experience, without contradiction, is against it."

It is undoubtedly true, as a general rule, that a statute shall not have a retrospect beyond the time of its commencement, or be so construed as to take away a vested right of property, or defeat a right of action already accrued. *Sayer v. Wisner*, 8 Wendell, 661. *Varick v. Briggs*, 6 *Paige*, 332. But that doctrine can have no bearing upon this case. While her husband lived, the plaintiff had no interest in the land; no right of property or of action which could be forfeited. Her misconduct vested no new interest or title in any third person, and consequently none was taken away by the act of 1830.

I cannot think it a sufficient objection to the plaintiff's claim, that there was a time, when if her husband had died, she would have been barred. Though she was disabled by *the adultery, and her dowable capacity was gone for a time, it was restored before the right accrued—the obstacle in the way of her taking was removed by the repeal of the act of 1787. The point is, I think, settled in her favor by authority. Coke says, "if the husband alien his land, and then the wife is attainted of felony, now is she disabled; but if she be pardoned before the death of the husband, she shall be endowed." *Co. Litt.* 33, (a). And Hargrave in his note, (202), gives a reading of Phillips, who holds, that "if the wife be attainted, and then the husband purchases land and aliens it again, and then the wife is pardoned, she shall have dower of the land which was purchased and aliened during the time she was not dowable." He adds—"So if the wife elopes, and the husband purchases lands and aliens them, and then the wife is reconciled, she shall have dower of those lands." The same doctrine was laid down in *Menvil's case*, 13 *Co. 23*, where it was said, in relation to the elopement, that it was "only a *temporary bar until reconciliation*, which being accomplished, the temporary bar ceaseth." And in relation to the pardon after the wife had been attainted of felony, it was said, that "when the impediment is removed, she shall be endowed."

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I think the learned judge was mistaken in the view he took of the case at the circuit, and that the non-suit must be set aside.

New trial granted.

[*201] *THE PEOPLE *ex relations* Norton *vs.* GILLIS.

Where the owner of a mill, by a written contract without seal, stipulated to pay a mill-wright for repairing the mill a certain sum in advance and a certain other sum when the mill should be finished; and further agreed to secure the mill to the mill-wright until the profits of the mill should be sufficient to discharge his claim; IT WAS HELD that the contract was not a lease, but an agreement for a lease; and it was further held, that if it could be considered a lease, it created an estate for life determinable when the claim of the mill-wright should be paid, and thus the estate being an estate of freehold, it could not be granted by writing without seal.

THIS was the trial of a *traverse* of an inquisition in a case of forcible entry and detainer, at the Washington circuit in June, 1838, before the Hon. JOHN WILLARD, one of the circuit judges.

By the inquisition the jury found that the relator had an estate in possession of a grist mill, situate, &c. and was lawfully and peaceably in possession until the 26th October, 1836, when the defendant with strong hand and a multitude of people entered and expelled him, and unlawfully and forcibly keeps him out. The inquisition was removed into this court by *certiorari* and *traversed* by the defendant.

On the trial the relator offered to prove, that on the 24th October, 1834, the premises and mill site in question were owned and possessed by the defendant, and that on that day he and the defendant entered into a written contract, without seal, by which he agreed to build, or rather repair, a grist mill for the defendant, in a manner particularly specified, to find all the castings, &c. and to have the whole done in November, 1836. The defendant on her part agreed to prepare the building or receive the gears, to furnish a corn-cracker and one run of stone then in the mill, &c. and to pay the relator for his work and materials \$1191.82, in the following manner—\$300 in advance, and \$891.82, to be paid with interest after the mill should be finished; and stipulated as follows: “And I do further agree to bind myself and heirs to secure the above mill to the said John till the profits [*202] of the mill is sufficient to discharge his claim.” The relator entered immediately after the date of the agreement, went on with the work, and continued in possession until the 26th of October, 1836, when the defendant entered the mill with two men and ordered the relator to quit, telling him that if he did not go he would be put out. The relator thereupon left the mill—the work not then being completed, nor the time for com-

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pecting it expired. The judge ruled against the relator—he excepted, and the jury thereupon found a verdict for the defendant. The relator now moves for a new trial.

C. L. Allen, for relator.

J. Crary, for defendant.

By the Court, BRONSON, J. The contract contained no words of present demise, and the parties did not, I think, intend that it should operate as a lease, but only as an agreement to give a lease after the mill should be completed. I have looked into the cases on this subject, and none of them go far enough to prove that the relator had a present interest in the property while the work was in progress. Indeed, if the work had been finished, I think his only remedy at law would be an action on the contract.

But if this was a lease, the case is embarrassed with another difficulty. It was a demise until the profits of the mill should be sufficient to discharge the debt. This grant for an indeterminate period created an estate for life, determinable when the debt should be paid from the rents and profits of the mill. *Co. Litt.* 42, (a). 4 *Kent's Comm.* 26. It was an estate of free-hold, which could not be granted without a seal, 1 *R. S.* 738, § 137, and this was a simple contract.

The agreement amounted to a license to enter for the purpose of doing the work; but it was revoked. For the breach of the contract by the defendant, the relator has a remedy by action to recover damages; but he has no title to the possession.

New trial denied.

"COOLEY & BANGS *vs.* BETTS.

[*203]

An action will not lie against a factor or agent to whom goods are sent to be sold at auction, without a *demand* of the proceeds or *instructions to remit*, before suit brought.

It seems that there is a distinction between an action for *not accounting* and an action for *not paying over* the proceeds of goods sold, and that in the former case it is enough to show a neglect to account within a reasonable time, to maintain the action.

ERROR from the New York common pleas. Betts sued Cooley and Bangs in the common pleas, and declared on the common counts in *assumpsit* for goods sold, money had and received, &c. The declaration also contained a special count that in consideration that the plaintiff would deliver goods, wares and merchandizes to the defendants, to be sold by them for him, they undertook to sell the same, and to render a true and just account of the sale

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and of the proceeds *when they should be thereunto afterwards requested.* The plaintiff then averred a delivery of the goods to the defendants, a sale by them, and a *request* to account and pay over, and for breach alleged that the defendants had not rendered an account of the goods or of the moneys arising from the sale. There was a second special count, similar to the first. The defendants pleaded *non-assumpsit* as to all but \$28,98, and as to that a tender. The tender was admitted in the replication. On the trial in the C. P. the plaintiff proved that in March, 1837, he sent a quantity of books which cost \$419,16, to the defendants, to be sold at *auction*, and that the defendants during the same month sold the books. Upon this proof he rested. The action was commenced in October, 1837. The defendants moved for a nonsuit on the grounds : 1. that *no demand* of an account or request for a settlement had been shown ; and 2. that there was no proof of the amount for which the goods sold. The motion was denied, and the defendants excepted. In the further progress of the trial, the defendants showed that the proceeds of the plaintiff's goods on the sale were \$210,07. A verdict having passed against the defendants, they sued out a writ of error.

[*204] *Willis Hall, (attorney general,) for the plaintiff in error.

R. Lockwood, for the defendant in error.

By the Court, BRONSON, J. In the absence of any express stipulation between the parties, the law will imply a promise by a factor, bailiff or other agent to render an account to his principal ; but it seems not to be fully settled whether the agent will be deemed in default after the lapse of what may be considered a *reasonable time*, or whether he must be plainly put in the wrong, by showing a *demand* before suit brought.

So far as relates to the two special counts, it is not necessary to decide this question, for the plaintiff has not declared on a promise to account *within a reasonable time*, but on a promise to account on *request* ; and a special request is alleged in stating the breach. The plaintiff has put his own construction upon the contract, and if we should think him mistaken, and that he might have recovered in another form of declaring, I do not see how we can help him out of the difficulty. In the language of Best, C. J. in *Elbourn v. Upjohn*, 1 Carr. & Payne, 572, the plaintiff has tied himself down to a particular averment, which he is bound to prove.

But as the declaration also contains the money counts, the question is presented in another form. In relation to those counts, I may remark, that it does not appear whether the factors were to sell for cash or on credit, nor whether they have received the money. But if we assume that the sale was for cash, and that the money was paid, I still think the plaintiff cannot recover without showing a demand, or instructions to remit. The action is

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founded on a supposed breach of trust, which must be made out affirmatively, before the agent can be charged.

In *Buller's N. P.* 148, it is said, that where *indebitatus assumpit* is brought for money received *ad computandum*, it is necessary to prove a misapplication, or breach of trust; for if a man receive money to a special purpose, it is not to be demanded of the party as a duty, till he have neglected "it, or refused to apply it according to the trust. He cites [*205] *Poulter v. Cornwall*, 1 *Salk.* 9, where the money was received *ad computandum*, and on a motion in arrest of judgment, the court said, it must be intended, after verdict, that there was proof to the jury that the defendant refused to account, or had done somewhat else that rendered him an absolute debtor. In *Ferris v. Paris and others*, 10 *Johns. R.* 285, the defendants were foreign factors, and had rendered an account of the goods which had been consigned to them for sale. It was held that an action against them for the proceeds of the goods would not lie, until they were shown to be in default, by proving a demand, or an improper disregard of instructions to remit the money. In *Taylor v. Bates*, 5 *Cowen*; 376, it was held that an action would not lie against an attorney for money collected for his client, until after a demand, or a request to remit. *Woodworth, J.* said, the contrary doctrine would be in opposition to the nature of the defendant's trust, as well as against justice and good faith. The same point was adjudged in *Rathbun v. Ingalls*, 7 *Wendell*, 820, where the plaintiff was nonsuited, although several years had elapsed between the time of collecting the money and the bringing of the action. In *Topham v. Braddick*, 1 *Taunt.* 572, the defendant was a foreign factor, see p. 104, and it was held that no action would lie for not rendering an account of the goods consigned to him for sale, until there had been a demand by the principal; and, consequently, that the statute of limitations did not commence running when the goods were sold, but on a demand made.

In Massachusetts, the rule seems to be that a request is not necessary in the case of a *foreign* factor, on account of the great inconvenience and embarrassment to trade which would follow, if the merchant was obliged to send abroad to make a demand: and, in general, the factor to whom goods have been consigned for sale, is liable to an action without showing a request, if he neglect to render an account within a reasonable time; but if he has rendered an account at the proper time, an action for the proceeds of the goods will not lie without a demand, unless it appears [*206] the course of the business that the factor was to remit without instructions. *Clark v. Moody*, 17 *Mass. R.* 145. *Langley v. Sturtevant*, 7 *Pick.* 214. *Dodge v. Perkins*, 9 *id.* 368, 387. I do not understand these cases as conflicting with the doctrine, that this action for money had and received to the plaintiff's use, cannot be maintained without showing ei-

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ther a demand, or instructions to remit; or, that, according to the course of this business, it was the duty of the defendants to remit without instructions; neither of which facts were proved in this case.

Whether the distinction taken in the Massachusetts cases in relation to foreign factors, rests on a solid foundation, we need not now consider; for it does not appear in this case but that both parties reside in the same state. But I cannot forbear to remark, that the inconvenience of sending abroad to make a demand, cannot alter the nature of the factor's trust: and if other agents are not in default until after a request, I can see no principle which will subject the foreign factor to an action without a demand. In *Ferris v. Paris*, 10 Johns. R. 285, and in *Popham v. Braddick*, 1 Taunt. 572, the defendants were foreign factors, and in both cases a demand by the principal was held to be necessary.

I am not disposed to deny that there may be a sound distinction between an action for not accounting, and an action for not paying over the proceeds of the goods. It is the duty of an agent to render an account of his transactions to his principal within a reasonable time, and when it appears that he has neglected to do so, an action for not accounting may, perhaps, be maintained without a demand. But here there was no evidence to show that the defendants had not rendered an account. And besides, the action is for not paying over the proceeds of the goods—the special counts being laid out of the case—and in such an action it is necessary to show a demand, or instructions to remit.

After a great lapse of time, and when nothing appears to the contrary, it may be presumed not only that there has been a demand by the principal, but that an account has been rendered and settled by the agent. *Popham v. Braddick*, 1 Taunt. 572. But that doctrine obviously proves too

[*207] *much for the plaintiff's case. In the absence of any direct evidence on the subject, there is, at the least, as much reason for presuming that the defendants have faithfully discharged their trust, as there is for presuming them guilty of a culpable neglect of duty; and if we presume a demand by the plaintiff, we must presume also an account and payment of the proceeds by the defendants.

The defendants offered a set-off for other goods purchased by the plaintiff at the same auction, which was called a "trade's sale;" but the case is defective on this point, in not stating that any question was made and exception taken after the proof came out that a part of those goods had been delivered. On another trial, it may be difficult for the plaintiff to distinguish the case from that of *Mills v. Hunt*, 17 Wendell, 833. But the judgment must be reversed on the other ground.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF NEW-YORK,

In July Term, in the sixty-fifth year of the Independence of the United States.

GROUSSET vs. THE SEA INSURANCE COMPANY.

A policy of insurance upon the body, tackle, &c. of a vessel, *at and from New-Orleans, Campeachy, and Havana*, for the period of six calendar months from a certain day, is a policy on time, and does not limit the navigation of the vessel to voyages between the places specified in the policy; provided the vessel take her departure from either of them, let her port of destination be where it may, she is under the protection of the policy for the whole period of the specified time.

ERROR from the superior court of the city of New-York. This was an action on a marine policy of insurance effected in the city of New-York on the 12th September, 1835, upon the body, tackle, apparel and other furniture of the schooner HERO, *at and from New-Orleans, Campeachy and Havana*, for the period of six calendar months from the 12th September, 1835; beginning . the adventure upon the said vessel, tackle, apparel, &c. at *as* aforesaid, and so shall continue and endure until the said vessel be safely arrived at *as* aforesaid. (The policy was created by filling up a printed blank form; the word *beginning* and the 28 succeeding *words were all [*210] parts of the printed form, except the word *as* twice occurring, which was written in blanks manifestly left for the designation of the ports of *departure* and *destination*.) The sum underwritten was \$5000; the premium \$300. On the 18th September, 1835, the schooner was undergoing repairs at New-Orleans. On or about the second day of October, she sailed from *New-Orleans* with a cargo bound for *Campeachy*, where she arrived on

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or about the *ninth* day of October, whence she sailed on the *sixteenth* of the same month, and arrived in the *Havana* on or about the *thirteenth* day of *November*. On the second day of *December* she sailed from *Havana* with a cargo bound for *New-York*. On her passage, she encountered a violent storm and sustained serious injuries, so as to be obliged to put in at *Charleston*, where she was repaired. The average of the expense of repairs chargeable to the underwriters upon the vessel was \$1885,06. The presiding judge charged the jury, that to him it seemed the intention of the parties was to insure the vessel *in a specific trade or navigation* for a limited time; that though the policy partook of the character of what is called a time policy, yet the insurance was *at and from* *New-Orleans, Campeachy and Havana* for the period of time mentioned in the policy; that these ports or places must have been specially named to indicate the voyages in the contemplation of the parties; that the words *at and from* applied equally to each of the ports or places named, and that the word *to* after the word *New-Orleans* and before the word *Campeachy*, and between that word and *Havana*, was necessarily implied from the form and terms of the description, and if necessary to complete the sense, ought to be supplied or understood; that if the six months were not expired on the arrival of the vessel at *Havana*, she might proceed to *New-Orleans* and continue her voyages between the places named in the policy until the expiration of the six months; but that the disaster and damages having been encountered in a voyage entirely out of the rout of the voyages and navigation prescribed by the policy, the defendants were not liable to contribute towards the expenses incurred [*211] in the repair of the vessel. The counsel for the plaintiff excepted to the charge. The jury found a verdict for the defendants, upon which judgment was entered. The plaintiff sued out a writ of error.

F. B. Cutting, for the plaintiff in error.

A. G. Rogers, for the defendant in error.

By the Court, NELSON, Ch. J. The questions presented by this case are, whether the policy is to be regarded as limiting the risk by the particular time fixed therein, making it what is called a *time policy*, or by a *specific voyage, or course of trade*, for a limited time. The latter view was taken by the court below.

The counsel for the defendants contends, that the insurance was for a voyage or voyages *at and from* *New Orleans* to *Campeachy* and *Havana*, and until the vessel arrived back at these several places, provided the six months had not expired. The court below were of opinion the trade might continue *to and from* the specified ports, until the expiration of the time.

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The whole case turns upon the true meaning of the clause “*at and from New-Orleans, Campeachy and Havana,*” in the connection used : if it limits the risk to a specific trade to and from these ports, exclusively, then the judgment is correct ; but if intended merely to designate the place or places from which the vessel was expected to start on her voyage, then it cannot be upheld, as the risk would not terminate till the end of the six months, within which the loss happened.

The intent to insure the vessel for six months from the 12th September, on a trading voyage or voyages, is clear, and should prevail, unless the company have, with reasonable certainty, attached a condition thereto which has not been observed.

It is admitted that the language of the policy “*at and from New-Orleans, Campeachy and Havana, for the period of six months,*” does not, in terms, import a voyage to and from these places, and, therefore, we are asked to interpolate “the word “to,” on which to predicate the [*212] condition. If, as is supposed, the trade must be confined to these places, being the only ports mentioned in the policy—must be “*at and from*” them exclusively, during the six months, the word is necessarily implied, as the vessel must pass from one to the other in her circuit ; but the argument obviously assumes the whole point in controversy. It is denied that such is the fair and legal import of the instrument, and it is contended to be simply a policy on time, the trade commencing on a particular day, “*at and from*” either of these ports, and thence without restriction for the six months.

Usually, when the insurance is upon a particular voyage or voyages, there is no reference to time when the risk commences or terminates. The place or places from and to which the vessel is bound, are the *termini*, and are designated in the policy. When the insurance is for a term of time, the *termini* of the risk are the day and hour specified when the insurance commences and terminates, and the statement of the *place* of either is not common. In *Manly v. United M. & F. Ins. Co.*, 9 Mass. R. 82, the policy was on a vessel “*for one year, commencing the risk at B. on the 7th December*”—but in point of fact, she had left that place on the 6th, and was some 50 miles distant on the 7th. The loss happened within the year, and the plaintiffs recovered : the court holding the risk determined by time, and the place of commencement upon fair construction not material.

In *Martin v. Fishing Ins. Co.* 20 Pick. 309, the terms were “*at and from Calais, Maine, on the 16th day of July, at noon, &c. for six months.*” There was no evidence that the vessel was at or prosecuting her voyage from Calais on the day named, yet it was held the policy attached, as it was the clear intent of the parties to insure on time, without regard to the place. The particular point decided in these cases is not material here, as the ves-

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sel sailed on her voyage after the time and from the place mentioned ; but the rule of construction established on these time policies, where the place is designated "at and from" which, the vessel is to start on her voyage, is material. The time may control, if from the whole case such appears to have been *the intent of the parties. It is observable [*213] also, that the language used in designating the place in the last case is the same, word for word, as found here in respect to the three places named, and is the appropriate language in these instruments for designating the place of commencement of the voyage. A strong illustration to this effect may be seen in *Sellar v. McVicar*, 1 N. R. 23. The words there were, "at and from Demarara, Berbice, and the W. and L. Islands to London." The ship being at Demarara, the master entered into an agreement with a house for freight from Berbice to London, and at the same time agreed to take a cargo at Demarara to be delivered at Berbice, the whole being one entire agreement. The ship took in the cargo and broke ground, for the purpose of proceeding to Berbice, and after she had so broken ground, and while continuing at Demarara, was lost. The court held, that the voyage insured was from Demarara to London, or from Berbice to London, or from any of the W. and L. Islands, according to the place from which the ship might happen to sail on her voyage to London. See also *Leathly v. Hunter*, 7 Bing. 517, and 1 Phillips on Ins. 437, 442, ed. of 1840. Now, construing the terms of the policy before us as they are generally understood, and as construed in the case of *Sellar v. McVicar*, and there is no difficulty in giving full effect to every part of the instrument. The place or places which the vessel was expected to start on her voyages are given ; the terminus ad quem is not, nor was this material to the risk, as that was limited by the term of time. It was, doubtless for this reason, omitted.

It is true, that in *Sellar v. McVicar* the court restricted the voyage to the commencement at one of the places mentioned ; but that was a policy for a particular voyage, the termini being given. Here the port of destination or discharge is left open, the assured at liberty to make any voyage or voyages he thought proper, within the running of the policy, and therefore the reason for such restriction has no application. He may sail in the course of his contemplated trade from one or all of them within that period, without departing from the terms of his policy or enhancing the risk [*214] assumed. The "several ports "at and from" which, the vessel might sail, were probably mentioned because the assured was not certain at which she might be at the date of the policy. They were mentioned from abundant caution.

But it appears to me that the above conclusion is also best supported, even upon the ground of construction insisted on by the company. Were we to interpolate the word *to*, and regard the policy as fixing the trade from New-

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Orleans to Campeachy and Havana, did the risk terminate on the arrival of the vessel at the latter port within the six months? That is not pretended by any one. It is said, however, that the *iter* is confined to these ports, and therefore the vessel must return to New-Orleans. But "at and from" Havana, the port last mentioned, does not necessarily imply this direction. Even assuming the track was intended to be described, the description ends here: and yet an *iter* beyond is obviously contemplated. The interpolation of the word *to* will not help out the difficulty; a port of destination must also be added before the vessel can be made to return to New-Orleans. This appears to me an unnecessarily forced construction; a much more natural one is, that after the arrival of the vessel at Havana the *iter* is left open, the risk afterwards depending solely upon the limitation of time. *That* not having expired, the master was justified in sailing with his cargo for New-York.

The view thus taken is not weakened by the subsequent clause referred to, namely: Beginning the adventure upon the vessel, &c. at as aforesaid, and so shall continue and endure until she shall safely arrive *at as aforesaid*. The form of the policy used is the common one in case of insurance for a *particular voyage* where the *termimi* are given. This, together with several other provisions, have no consistent or possible application to the case of an insurance on time, or where that enters into the description of the risk.

In any view that I have been able to take of this case, it seems to me the plaintiff below was entitled to recover, and that therefore the judgment should be reversed.

Judgment reversed.

*THE PEOPLE, *ex relatione* SMITH *vs.* FISHER. [*215]

The authority of a *deputy clerk*, who discharges the duties of the office of county clerk in consequence of the *death* of his principal, *ceases* on the *appointment* by the governor of another person, to execute the duties of the office until the *vacancy* in the office of clerk be supplied by an election.

INFORMATION in the nature of a *quo warranto*. On the 11th January, 1840, the attorney general on the relation of *Chauncey Smith*, filed the information in this case charging *Thomas H. Fisher* with having on the 21st December, 1839, usurped the office of clerk of the county of Westchester, and averring that the relator is rightfully entitled to the office. The defendant *pledged* that at the general election held in Westchester in November, 1837, *John H. Smith* was duly elected clerk of the county; that on the

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29th November, 1838, he appointed him, the defendant, *deputy clerk* of the county and he thereupon took upon himself the discharge of the duties of the office, and continued in the discharge of such duties up to and at the time of the death of *John H. Smith*, which took place on the 17th November, 1839; that by virtue of his appointment as *deputy clerk*, and by reason of the vacancy in the office of *clerk* of the county by the death of *John H. Smith*, he became authorized to perform all the duties, and entitled to all the emoluments appertaining to the office of *clerk* of the county until the vacancy which occurred by the death of *John H. Smith* was duly filled pursuant to the constitution and laws of the state. That he accordingly on the 17th November, 1839, in pursuance of his appointment as *deputy clerk*, took upon himself the office of *clerk* of the county, performed its duties, and at the time of exhibiting the information was and still is *acting clerk* of the county. The defendant also denied the right of the relator. To this plea the attorney general *replied* that on the 7th December, 1839, *Chauncy Smith*, the relator in this case, was duly *appointed* by the governor of the state, *county clerk* of the county of Westchester during the [*216] time limited by the constitution and laws of the state; of which appointment notice was given to the defendant on the 20th December, and demand made of the books, papers and records of the office, concluding with a verification and prayer of judgment of ouster. Then follows an averment that the relator is entitled to the office of *clerk*, and concludes to the country. The defendant *demurred* to the replication, and among other special causes of demurrer, assigned that the replication erroneously concludes to the country, whereas it should have concluded with a verification.

J. Holmes & M. T. Reynolds, for defendant.

Willis Hall, (attorney general) for the people.

By the Court, BRONSON, J. Although I have found this a more difficult question than I supposed it to be on the argument, further consideration has not changed the opinion which was then intimated, that the relator is entitled to the office.

Sheriffs and clerks of counties are to be chosen by the electors, "once in every three years, and as often as vacancies shall happen." *Const. Art. 4, § 8.* The legislature at first provided for *special elections* to supply vacancies in those offices. *Statutes of 1823*, p. 418. But as it was found inconvenient to have elections for county officers oftener than once in each year, the law was afterwards altered, and it was provided, that all vacancies

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in the office of sheriff or clerk, should be supplied “at the *general** election next succeeding the happening thereof.” 1 R. S. 128, § 8.

Provision has also been made for discharging the duties of those offices during the time which must elapse before the place can be supplied by election. Every *sheriff* is required by law to appoint an *under sheriff*, who is to execute the office in case of a vacancy, until a new sheriff is elected or appointed, and duly qualified. 1 R. S. 379, § 71, 72. And every *county clerk* is required by law to appoint a *deputy clerk*: 1 R. S. 376, § 56; and “whenever the *office of any county clerk shall be [*217] come vacant, his deputy shall perform all the duties, and be entitled to all the emoluments, and be subject to all the penalties appertaining to the office of clerk of the county, until a new clerk shall be elected or appointed for such county, and duly sworn.” § 59, as amended by the 4th section of the act of April 20, 1830. *Statutes of 1830*, p. 385. It is also provided, that “in *every case* where a vacancy shall occur in the office of sheriff or county clerk”—“the governor shall appoint some fit person who was eligible to the office, to execute the duties thereof, until it shall be supplied by an election.” 1 R. S. 124, § 49, as amended by the 2d section of the act of February 26, 1830. *Statutes of 1830*, p. 64.

These provisions are entirely harmonious. The *under sheriff* or *deputy clerk* is to hold, until a new officer is elected or appointed. When the governor exercises the power conferred on him to appoint, and the new officer is prepared to act, the authority of the *under sheriff* or *deputy clerk* is at an end by express limitation.

The order of stating the case may be reversed. The governor is to appoint some person to fill the vacancy; but until that is done, the *under sheriff* or *deputy clerk* is to discharge the duties of the office. If there is nothing to control this view of the question, it is quite clear, that the relator, who has been appointed by the governor, is entitled to the office; and that the defendant has held it wrongfully since the 20th of December last, when he had notice of the relator’s appointment, and was required to surrender the trust.

The objection to the relator’s title rests principally upon the order in which the several statutes were passed. Originally, the case of a vacancy arising from the *death* of the incumbent was *excepted* out of the otherwise unlimited power of the governor to appoint. 1 R. S. 124, § 49. But the exception was, in effect, repealed by the second section of the act of February, 1830, so that the power of the governor to appoint, afterwards extended to “*every case* where a vacancy shall occur.” A third section was, however, added, which, taken in connection with a provision of the R. S., would possibly have defeated the intention of the legislature, as manifested by the second section, if a subsequent stat-

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ute had not been passed to obviate the difficulty. The third section was as follows:—"The preceding section shall not affect the power now vested by law in any sheriff, or clerk of any county, to appoint under sheriffs, or deputies; *nor the powers of said under sheriffs or deputies, as now declared by law.*" *Statutes of 1830*, p. 64. The power or right of the deputy clerk, *as then declared by law*, was to hold until a new clerk should be *elected*. 1 R. S. 376, § 59. The particular terms of this 59th section were evidently overlooked by the legislature in framing the act of February, 1830, and the consequence was, perhaps, that the third section of that act nullified the second; for though the governor might appoint, the person appointed could not get the office, because the deputy was authorised to hold until a new clerk should be *elected*. The error was discovered before the session ended, and on the 20th April, 1830, the 59th section was amended, so that the deputy was only to hold until a new clerk should be elected *or appointed*. *Statutes of 1830*, p. 385, § 4. After that amendment was made, all the different provisions, as I have before remarked, were in harmony with each other. The governor might appoint in *every case* of a vacancy; but in the mean time, and until that power was exercised, the deputy was authorised to discharge the duties of the office. Full effect may now be given to the third section of the act of February, 1830, without prejudice to the relator's title. "The powers" of the deputy "as now declared by law," are not "affected" or taken away by the appointment, for he only has power or right to hold *until the appointment is made*.

If it were necessary to decide the point, I should be strongly inclined to the opinion, that the act of February, 1830, in itself, worked an abridgment of the powers of the deputy, so that his holding would terminate with the exercise of the power conferred on the governor. It is evident from the second section of that act, that the legislature intended to extend the power of appointment to the case of a vacancy by death—the only [*219] excepted case in the 49th section—and thus make it universal; and the third section was, I think, only added by way of caution, to avoid the possible inference that the power conferred on the governor to appoint, would take away the right of the deputy to hold *until the appointment was made*, or an election had. The legislature certainly could not have intended to do a thing so absurd as to say, that the governor might appoint, but the deputy should nevertheless continue to hold the office.

But it is unnecessary to decide how the case would have stood upon the act of February, 1830, for the act of April in that year has settled the question. The order in which the several enactments were made, cannot control the question. Statutes *in pari materia* should be construed together; and looking at all the enactments as they now stand, there can be little room for doubt that the legislature intended the governor should appoint,

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and that the powers of the deputy should thereupon cease, as well in the case of a vacancy by death, as where the office becomes vacant in any other way.

It was said that the statute giving the governor power to fill the vacancy conflicts with that clause of the constitution which declares, that “ sheriffs and clerks of counties—*shall be chosen by the electors* of the respective counties, once in every three years, *and as often as vacancies shall happen.*” Art. 4, § 8. That is dangerous ground for the defendant to occupy; for if the vacancy can only be supplied by *election*, his title to the office is, of course, at an end; and judgment must be rendered against him, although the relator may also fail in his claim. But I feel no great difficulty in saying, that the law is valid. There must of necessity be an interval of time between the death, resignation or removal of the incumbent, and the filling of the vacancy by the electors; and it is essential to the public welfare that some person should in the mean time discharge the duties of the office. The legislature has provided that the vacancy shall be supplied by the people at the next general election after it happens; 1 R. S. 128, § 8; and that in the mean time the duties of the office shall be discharged either by the deputy or by a person appointed by the governor, or by both of them.

*This space in which the office may not be filled by election can [*220] never exceed one year, and may sometimes amount only to a few days. How long it may happen to be, provided it do not extend beyond the next annual election, is a question, I think, fairly within the discretion of the legislature. The language of the constitution is not, that the office shall be filled by election *in every possible case*, nor that a vacancy shall be supplied in that manner *as soon* as it happens; but the language is, that vacancies shall be supplied by election *as often* as they happen. That end is fairly attained by referring the matter to the people at their next stated period for exercising the elective franchise.

A distinction was attempted between the law authorizing the deputy to hold, and that empowering the governor to appoint; and it was said that the former was valid, and the latter void. The argument was based on the fact, that the new constitution took from the central power the authority which it had previously exercised of appointing clerks of counties, and gave it to the people. But, as we have already seen, the election of those officers was not given to the people under all possible circumstances, and to be exercised the moment a vacancy should happen. The argument in favor of the deputy necessarily concedes, that the constitution leaves it open to the legislature to supply the place until the people can conveniently exercise their privilege. And if the legislature may supply the place in one way, I do not see why it may not be done in another, for the constitution says *nothing whatever on the subject.* It is said, however, that the statute giving the appointment to

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the central power, though not against the letter, is contrary to the *spirit* of the constitution, and therefore void. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation, under the notion of having discovered something in the *spirit* of the constitution upon a subject which is not even mentioned in the instrument.

The objection that the replication does not conclude in the proper form, rests on a misconstruction of the pleadings.

Judgment for the people.

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*NORTHROP vs. WRIGHT.

In a controversy in an action of *ejectment* between one claiming under a *prior possessor* and the other under a *subsequent possessor*, the obtaining of a deed by a predecessor of the latter from several of the heirs of the *prior possessor*, is an admission of title in their ancestor.

Such deed fastens upon the grantee and those claiming under him the character of a *tenant in common* with the grantee of the *other heirs* of the *prior possessor*, and the possession held under such deed is not *adverse* to the rights of the other grantee, unless the presumption arising from the acceptance of the deed be satisfactorily explained.

Possession of twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognised, was held, in this case, not to be sufficient to authorize a jury to presume an *ouster*, where before twenty-five years had elapsed, the co-tenant had made an *actual entry* upon the land, and was forcibly expelled.

Whether a certificate of the acknowledgment of a deed taken in 1784, not stating that the grantor was known to the officer, be sufficient to authorize the reception of the deed in evidence, *querre*.

Where a will produced on the trial of a cause was more than fifty years old, it was held that the legal presumption attached that the witnesses were dead, and that the party might resort to *secondary evidence* to prove the will; and that its production with the probate attached was sufficient evidence to authorize its being read.

A grantor's declarations after he has parted with his title are not admissible to affect his grantee; yet, where such declarations have been received as evidence, a new trial will not on that ground be granted on a *cause* made, where the court see that the result would be the same if the evidence was rejected—on a *bill of exceptions*, however, it would be of course in such case to grant a new trial.

THIS was an action of *ejectment*, tried at the New-York circuit in March, 1837, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiff claimed to recover an undivided third part of one-eighth of a lot of about 10 acres of land, situate in the city of New-York. He proved that one *Arnout Webbers* was in possession of the premises previous to 1784, and died in possession. The plaintiff produced from the surrogate's office in the city of New-York, the last will and testament of *Arnout Webbers*, bearing date 23d August, 1776, whereby the testator devised

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to seven of his children and one grand-child all his estate, real and personal, without however specifying any particular premises, to be divided between them, share and share alike. On the back of the will was endorsed the probate thereof and the granting of letters testamentary by the judge of the court of probates of this state under date of the 13th September, 1784. The will was read in evidence without other proof of its execution, though objected to by the defendant's counsel. It was proved that after the death of *Arnout Webbers*, his son *Philip* entered into possession of the premises, and continued in possession three or four years, when he surrendered the possession to *Medcef Eden*; but upon what terms, or for what cause, did not appear. The plaintiff also produced in evidence a deed of the one-eighth of the premises, bearing date 13th September, 1784, executed by *John Webbers*, a son of *Arnout Webbers*, to *Joel Northrop*. This deed was acknowledged 14th December, 1784, before Roger Sherman, one of the justices of the superior court of Connecticut, who certified that *John Webbers*, "signer and sealer of the foregoing instrument," appeared "and acknowledged the same to be his own free act and deed." The counsel for the defendant objected to the deed being read in evidence, on the ground that the execution thereof had not been sufficiently proved; but the objection was overruled. The plaintiff proved that in 1812 or 1813, Mrs. Van Orden, one of the children of *Arnout Webbers*, pointed out the premises in question as the lot which belonged to her father: this evidence was also objected to, but received. He also proved that *Joel Northrop*, the grantee of *John Webbers*, died in 1807 or 1810, and that he (the plaintiff) was one of three heirs of *Joel Northrop*; that in 1820, an agent of his erected a house on the premises in question, which was torn down by the defendant, and the agent turned out of possession. Whereupon this action was brought in July term, 1834.

The defendant proved that *Medcef Eden* was in possession of the premises in 1795, and continued in possession until his death in 1798, having by his last will and testament devised the premises to his son *Medcef*, who succeeded him in the possession. On the 7th July, 1801, the interest of *Medcef Eden* in the premises was conveyed by the sheriff of New-York, in pursuance of a sale by virtue of an execution, [*223] to W. Barlow and J. Sharp. In 1805, the interest of Barlow and Sharp became vested in A. *Kinder* and B. *Bakewell*, whose interest by sundry mesne conveyances became vested in the defendant in 1825. A continued possession was shown from *Medcef Eden* down to the defendant; none of the conveyances, however, containing covenants of title, the deeds being mere quit-claims.

To rebut the effect of this testimony, the plaintiff read in evidence a deed bearing date 21st December, 1807, executed by all the devisees of *Arnout*

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Webbers, (except his son *John*, who had conveyed to *Northrop*,) to *A. Kinder* and *B. Bakewell*, under whom the defendant claims title, conveying to them all the interest of the grantors in the premises in question.

The jury under the charge of the judge found a verdict for the *plaintiff*, and the defendant on a *case* made moved for a new trial.

J. Miller, for the defendant.

W. S. Sears & S. P. Staples, for the plaintiff.

By the Court, *Cowen, J.* No title in either party having been proved by direct evidence, the stress of the controversy at the trial lay upon the possessions under which the parties respectively claimed. Of the defendant's general possession and that of those under whom he claimed for a period sufficient to satisfy the statute of limitations, no doubt was made ; indeed such possessions were admitted at the trial—their character alone was disputed. Of the prior possession of *Arnout Webbers*, there was very little direct evidence ; but what there was, when connected with the deed of 1807, from all his heirs except *John*, to *Bakewell* and *Kinder*, made out a very strong circumstantial case in favor of the possession ; and I think entirely warranted the learned judge in the assumption, that it was made out, by which he introduced his charge to the jury. The defendant [*224] claims under *Bakewell* and *Kinder* ; his title being derived from nothing beyond quit-claim deeds coming down from *Medcef Eden*, who appears to have succeeded *Philip Webbers* in a possession which he took from his father *Arnout*. Certainly there is nothing, as the judge remarked, to show an abandonment of possession by *Arnout* or his heirs ; at least no direct evidence. The possession of *Arnout* was *prima facie* evidence of a fee in him, and it came in a course of regular transmission, either by devise or descent to his heirs, seven of whom quit-claimed to the predecessors of the defendant in 1807. This is the same, in legal effect, as if the defendant had taken that deed to himself ; and leaves it difficult for the mind to resist the idea that all parties considered *Arnout* as one having held the prior title. Such an act amounts to a clear concession by the defendant himself that he must look to *Arnout Webbers*, not *Medcef Eden*, as the source of his title. It sanctions all that could be inferred from the plaintiff's witnesses on the head of *Arnout's* possession, and superadds a virtual admission that he claimed a fee.

This deed to *Bakewell* and *Kinder*, when viewed in connection with the other evidence in the cause, was also properly treated as having another effect. It fastened on them and their successors the character of co-tenant with the plaintiff and his ancestor, in the proportion of seven parts in the

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former to one-eighth or a part of that in the latter ; from which the defendant certainly could not clear himself without showing some positive act by which he or those under whom he came in, disclaimed such a relation, and that, so long as twenty-five years before suit brought. No such act was shown directly, nor was there anything, that I see, from which the jury could have been left to infer it. We have nothing but general possession of one tenant in common. *That* he had a right to ; and the law always intends that a man is in according to his right, until the contrary appears. It accordingly intends, in this case, that the defendant and his privies had all along holden the total possession of the land both for themselves and the plaintiff or his privies, with whom the former held a friendly not an adverse relation. *Such an intendment is fatal to the defence, [*225] so far as it rests on adverse possession.

I am aware of no cases either in this or any other court which stand opposed to the views I have expressed. The better opinion is, that mere general possession of land or other property, even without explanation, must be received as *prima facie* evidence of absolute ownership. To this point I collected several authorities in note 309, 1 *Phil. Ev.* p. 353, 354, of the *Notes by Cowen & Hill.* I shall not go over them ; for the doctrine is not now denied. It must, then, be taken as a fact presumptively established, that Arnout Webbers was, in his life time, the owner in fee simple ; his heirs followed ; and it cannot, as the defendant's counsel seems to suppose, be overcome by the subsequent possession of Eden and those who followed him, even though that were adverse, short of 25 years. It is, till that time, but possession against possession, and the one prior in time must prevail. *Whitney v. Wright* 15 *Wendell*, 171, is relied upon as showing that an abandonment by the prior possessor will destroy the force of the presumption in his favor ; and no doubt he may so conduct himself as to neutralize the force of the presumption and turn it in favor of his successor, as my brother Bronson thought he had done in that case. Almost any presumption may be rebutted ; but I am still at a loss for the circumstance in the case at bar, which can give application to the doctrine. I find no proof that Arnout Webbers or his successors ever doubted their title. I must deny that the negative fact of delaying a legal assertion of it can operate as an abandonment short of the time required by the statute of limitations. Abandonment cannot be predicated of a prior possession till its force as evidence is gone ; and that is the idea which the word is intended to express.

The difficulty of seeing that any thing like an answering adverse possession was made out, after the character of co-tenant with the plaintiff and his privies attached, is fully demonstrated by one of the books relied on in behalf of the defendant. *Walworth, chancellor, in Butler v. Phelps*, 17

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[*226] *Wendell*, 642, 647. But it is contended that this long general possession of a co-tenant from 1807, "without any other evidence of an exclusive claim, should have been submitted to the jury as ground for presuming an ouster. That was done in *Doe, ex dem. Fisher, v. Prosser, Coup.* 217, on such a possession for 36 years; and a verdict founded on the presumption was sustained. There had been a dead silence in the co-tenants out of actual possession for nearly forty years, which was held barely to raise a case for the jury. The time was nearly double that required by the statute of limitations. In the case at bar, there was a recognition of the tenancy in common in 1807. Indeed it then first arose; and the plaintiff entered and took possession by his agent Kinsey, in 1830, whom the defendant ousted; and as an answer to a suit by the defendant, under the revised statutes, in his own favor, the plaintiff brought this action some four or five years after. Intermediate 1807 and 1830, the single term allowed by the revised statutes as a bar by adverse possession, which began previous to 1830, had not elapsed; and only two or three years beyond that term when this suit was brought. *Hart v. Vose*, 19 *Wendell*, 365, did not relate to the claim of adverse possession by a tenant in common.

The case at bar comes entirely short of the protracted and exclusive possession in *Doe v. Prosser*, with the unbroken silence appearing in that case. The lapse of time was there very great, and the silence entirely unaccounted for. Here it barely exceeds twenty-five years; and there was at least one very decisive step towards a claim, an actual entry under claim of title within that time. I am not prepared to admit that the judge was bound, under such circumstances, to leave the question of a bar by adverse possession to the jury. The rule is laid down too broadly in the marginal note to *Jackson ex dem. Jadwin, v. Joy*, 9 *Johns. R.* 102. All the court say there, is, that the circumstances relied on to show an adverse possession were, in that case, proper for the jury. The note lays down the rule in the abstract, as if the question must be left to them whenever it is raised, however decisive the testimony. The book proves no more than the others

cited by the counsel for the defendant: that where the question [*227] to be decided, "whether it be adverse possession or any other, is left in serious doubt upon the circumstances proved, it belongs to the jury." *Benham v. Cary*, 11 *Wendell*, 83. *Read v. Hurd* 7 *id.* 408. *Chesapeake and Ohio Canal Co. v. Knapp*, 9 *Pet.* 567. It is equally clear that where the facts are plainly established, and to these the legal rules of presumptive evidence are obviously applicable, and raise an obvious result, the judge may tell the jury so, as he seems to have done in this case, without incurring the imputation of an attempt to transgress the line which divides his duty from theirs. The same remarks are, I think, applicable to what he said of Arnout Webbers' possession, and the objection that the ju-

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ry should be put to pronounce on the question of its abandonment. I do not mean to say that the mere circumstance of Bakewell and Kinder taking, while in possession claiming under Eden, a quit-claim from the Webbers heirs was, *per se*, a conclusive admission of their ancestor's title. The act might have been explained, and rendered of such questionable import, as to raise a doubt for the jury to solve. *Jackson, ex dem. Vanderlyn, v. Newton*, 18 *Johns. R.* 355, 361. *Jackson, ex dem. Preston v. Smith*, 13 *Wendell*, 406, 413. But the total absence of any paper title in Eden, the prior possession of Webbers, the quit-claim character of the whole line of deeds through which Eden's title came down to the defendant, seem, when connected with the deed of 1807 to Bakewell and Kinder, to form a case against which a jury could hardly be allowed to find. By the simple act of taking title under you, I, in common presumption, admit your title. Here we have, not that act alone, and the presumption unrebutted but decidedly fortified by circumstances.

There were some points raised upon the admission of evidence which call for notice. The objection now made to the certificate of acknowledgment appended to the deeds of lease and release from John Webbers to Joel Northrop was not raised at the trial in its present form, and therefore cannot be noticed. At the trial, it was general that the execution of the deed was not well proved; here it is, that the certificate omitted to assert knowledge or proof of the grantor's "identity. If there be any- [*228] thing in this, and it had been mentioned at the trial, farther proof might have been given. *Norman v. Wells*, 17 *Wendell*, 136, 142. I do not therefore stop to inquire whether, at that early day, the identifying clause was requisite.

An objection was made to the reading of Arnout Webber's will, on the ground that the plaintiff and those under whom he claimed not having been in possession, it could not be received as an ancient muniment of title. This was true when the will was offered, and I think the defect was not, in the respect mentioned, supplied by the subsequent evidence. The will purported to be a devise to the heirs at law in general terms; and whatever may be said of the parties having a possession which might have been connected with the will we can no more impute it to that, than to the right of general inheritance. It is entirely equal, whether the claim and possession that followed was founded on one or the other. Why it should have been thought important, I am at a loss to conceive; for the plaintiff's title was good without it, and seems to be based rather on inheritance than devise. As an act of ownership by Arnout Webbers, it is equally a *non sequitur*, for it asserts no title to the premises in question, nor could it be made so to speak without proof that the devisor had no other real estate; whereas it was in proof that he had. However, though there was no possession by which the will could

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be authenticated, within our own cases, one principle on which an ancient will is said to be received without formal proof, seems to be a presumption, after thirty years from its date, that all the subscribing witnesses are dead. That was said by Lord Tenterden, C. J. in *Doe, ex dem. Oldham, v. Wolley*, 8 *Barn. & Cres.* 22 ; and he certainly applied the presumption there very strongly ; for he received the deed without the ordinary proof, though the subscribing witness was alive and in court. Vaughn, B. laid down the same rule at the trial of the cause. 3 *Carr. & Payne*, 402, S. C. nom. *Doe, ex dem. Oldnall v. Deakin* ; 2 *Mann. & Ryl.* 195, S. C.

But Lord Tenterden is not here reported so fully on the principle [*229] as he is in 8 *Barn. & Cress.* In the case at bar, time had "run from 1776, the date of the will. From that to the time of the trial was more than fifty years. I am of opinion the presumption clearly arose that all the attesting witnesses were dead ; and this fact always lets in secondary evidence of the execution. In secondary evidence there are usually no degrees. When the primary evidence is gone, you resort to what good fortune enables you to lay hold of as a substitute. This is often merely circumstantial. Thirty years' possession is with us one sufficient circumstance. A shorter time is allowed in England. 1 *Phil. Ev. by Cowen & Hill*, p. 503 of the text, in connexion with note 937, at p. 1357. In *Bradstreet v. Clarke*, 12 *Wendell*, 602, 677, this court held the producing a devise from the proper probate office, in England to be a material circumstance, though the will was not proved there. And in *Holton v. Lloyd*, 1 *Moll. Ch. R.* 30, 32, Chancellor Hart, on its being stated that a will was thirty years old, said, " The length of time, and its having come out of the proper office, (the prerogative office,) in my opinion are a sufficient foundation to entitle this will to be read." *And vid. 1 Phil. Ev. 481, text, ed. before cited, and id. note, p. 1357.* I am therefore of opinion, that both upon authority and the reason of the thing, the execution of the will in question was well made out by the secondary evidence. The original was produced from the proper office, with the registry of probate, in 1784. No improper reliance seems to have been placed upon the will as an act of ownership. I do not understand the judge in his charge to have mentioned it as proof of ownership. He alludes to it, but does not distinctly say for what purpose. That is perhaps the less material as there was quite sufficient proof of ownership without it.

It is impossible, however, to maintain that the declarations of Hannah Van Orden were admissible to affect the defendant. It is said she was one of his grantors, and so whatever she said of her ancestor's possession or ownership is receivable. That would be true, if her declaration had preceded her grant. But the latter was made in 1807, and her declaration not until 1812 or 1813. She was then a mere stranger. It is entirely settled [*280] that a grantor's declarations "after he has parted with his title,

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are not admissible to affect his grantee. *See the cases cited in Cowen & Hill's Notes to 1 Phil. p. 655.* Indeed a contrary rule would be intolerable on principle. Were this, therefore, a question made by bill of exceptions, we should be bound to grant a new trial. Coming, however, on the *case*, we have a discretion. The declaration seems to have been hastily received and could not have been much relied upon. The case, especially as to ownership, the point to which the improper evidence related, was entirely sustained without it. True, the declaration was received while the cause, in that respect, stood very weak. But in the progress of the trial it became so clear on other evidence, that I think the learned judge was fully warranted in assuming it as proved. It must be entirely useless to send the cause down to another trial, for the sake of avoiding testimony improperly received, when we cannot but see that the verdict should be the same without it. *Graham on New Tr.* 246 to 252, and *cases there cited.*

New trial denied.

BELL & HARVEY *vs.* LENT and others.

Where a *usurious loan* is made and promissory notes are pledged as security for the re-payment of the money, an action upon the notes cannot be maintained by the lender against the borrower.

Nor can an action be maintained by a third person who has received the notes from the lender under an agreement to *collect them and apply the proceeds* towards payment of a debt due to him from the lender.

A certificate of a notary, that he sent notice of protest to an endorser, directed to a certain place, *the reputed place of residence* of such endorser, is sufficient presumptive evidence that such place is the *reputed place of residence* of the party.

Whether his certificate that *he had not been able to find the endorsers, after making diligent search and enquiry for them,* is sufficient evidence of such inquiry, when the notice of protest is sent to a wrong place, *quere.*

THIS was an action of *assumpsit*, tried at the New-York circuit in June, 1838, before the Hon. OGDEN EDWARDS, one of the circuit judges.

*The plaintiffs declared on the *money counts*, and annexed to [*231] their declaration the copies of *two promissory notes* as the cause of action: 1. A note dated at *New-York*, May 9, 1836, for \$2346,55, made by W. Faulkner and payable to the order of James W. Lent, *five months* after date; and 2. A note of same date, made at same place, for \$2346,56, same maker and payee, due *nine months* after date. Both notes were endorsed by James W. Lent, Eddy & Chubb, and John McIntyre. The action was brought against *Lent, McIntyre and Eddy*, (Chubb being deceased.) Eddy and McIntyre separately pleaded the general issue, and

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gave notice that they would insist upon a partial failure of consideration. The signatures of the maker and endorsers were proved, and as to the *first note* the plaintiffs read in evidence a protest of a notary, stating that on the 12th *October*, 1836, he presented the note at the residence of the maker to a person there, and demanded payment, who answered that the maker was not in town and had left no funds to pay the note ; whereupon he protested the note. They also read in evidence a certificate of the notary endorsed upon the protest, stating that due notice of the protest was, on the 13th *October*, 1837, served upon *Lent*, by leaving the same at his residence in New-York, " and that not being able to find the endorsers *Eddy & Chubb* and *McIntyre*, after making diligent search and inquiry for them, I put in the post office in this city, notices directed to them respectively, *New-York*." The plaintiffs also read a protest of the *second note*, in which the notary stated that on the 11th *February*, 1837, he presented the note to Mr. Brown, the *administrator* of W. Faulkner, *deceased*, the maker of the note, and demanded payment, and that the administrator answered that he could not then pay it ; whereupon he protested the note. Accompanying the protest of this note was a certificate of the notary, stating that notice of protest was personally served on *Lent* ; that on the evening of the *eleventh* of February a notice of the protest was put in the post office of the city of New-York, for the endorsers *Eddy & Chubb*, directed to them, *Troy*, their reputed

[*232] place of residence ; that after making diligent search and inquiry in the city of New-York for "the endorser, *McIntyre*, and not being able to find him, he put a notice for him in the post office in the city of New-York, directed *New-York*, and another directed to him at *Troy*. A witness for the plaintiffs, on his cross-examination testified, that on the 13th *October*, 1836, *McIntyre* was boarding near the timber basin on the tenth avenue in the city of New-York, but had no place of business in the city ; his residence in *February*, 1837, was at *Fort Edward*, in Washington county, where he had resided many years. The residence of *Eddy* and his place of business in *October*, 1836, and *February*, 1837, was at *Whitehall*, in Washington county, and had been so for three or four years previous to those dates. On a further examination, he stated that *Eddy & Chubb* had a timber establishment at *Troy*, and *Chubb* resided there in *August*, 1836, though he died in that month.

The witness farther testified, that he was the agent of *Eddy & Chubb* ; that the notes in question were given in the regular course of business, and for full and valuable consideration ; that in August, 1836, they were sent to him in New-York by *Eddy*, with directions to procure them to be discounted for the benefit of *Eddy & Chubb* and *McIntyre* ; that he obtained an advance of \$2000 upon them from *Thomas S. Whitaker*, and hypothecated the notes with him. The rate of interest agreed upon at the time of the

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loan was three per cent. per month. The notes were left with Whitaker as *security* only; they were not sold to him. The plaintiffs then proved that on the 7th October, 1836, they sold to *Whitaker* a bill of exchange on a house in Liverpool for £1000, at $\frac{8}{4}$ per cent., amounting to \$4811.11, for cash, and held the notes on account of that bill. The witness who proved these facts, on his cross-examination, stated that Whitaker did not pay for the bill when it was delivered; that he called three or four days after receiving it and said that he could not pay the money, and asked the plaintiffs to collect the notes in question and apply the proceeds towards the payment of the money due for the bill, and the plaintiffs agreed to do so. The notes were at the time in the hands of the plaintiffs, having been placed *there on account of other transactions, which however had been [*233] closed.

The defendants moved for a nonsuit on the grounds: 1. That there was not sufficient evidence of *demand* and *notice*; and 2. That the plaintiffs had not shown such title to the notes as would authorize a recovery by them; that *Whitaker* having taken the notes as *security for an usurious loan*, acquired no title, and could not have recovered in an action upon them against the defendants; and that the plaintiffs, having taken the notes from Whitaker under an agreement to *apply the proceeds when collected* towards the payment of a *pre-existing debt*, had no better title than Whitaker, and could not recover. The judge refused to nonsuit the plaintiffs. The defendants then insisted that the plaintiffs were not entitled to recover on the note which fell due in *October*, 1836, for *want of notice* of non-payment; and that at all events, they were not entitled to recover *more than the amount of money loaned by Whitaker*, to wit, \$2000, with the interest thereof from the time of the loan, and requested the judge so to charge the jury. The judge refused so to charge, and the jury under his direction found a verdict for the plaintiffs for the amount of both notes, with the interest thereof, viz. \$5180.20. The defendants, on a bill of exceptions, moved for a new trial.

S. Stevens, for the defendants.

S. Sherwood, for the plaintiffs.

By the Court, NELSON, Ch. J. The demand and notice were *prima facie* sufficient to charge the endorsers on the note *last due*. There is no ground for complaint as to the *demand*, and the notary's certificate is full as to notice. Indeed, it was correctly directed to *Troy* for the purpose of charging *Eddy & Chubb*: it was their place of business, and the residence of one of them.

An objection was taken on the argument to the competency of this proof,

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[*234] as going beyond the facts to which the notary is authorized to certify under the act of 1833. The *point was not made on the trial, which would be a sufficient answer. But on looking at the statute, we are of opinion he did not exceed his authority. It makes the certificate, specifying the mode of giving such notice, and the reputed place of residence of the party to whom the same was given, and the post office nearest thereto, presumptive evidence of the facts. *Statutes of 1833*, p. 395, § 8. Here the mode was particularly pointed out, and *prima facie* sufficient in the law to charge the endorsers. There is some difficulty in maintaining the sufficiency of the notice to Eddy & Chubb and McIntyre on the note *first due*, especially as an objection was taken to it on the trial. Strict diligence should be shown to ascertain the residence of the endorsers, where the notice has been directed to the wrong place. *13 Johns. R.* 432.

The material question, however, in the case arises upon the plaintiffs' title to the notes. There was *no sale* of them to Whitaker, and therefore the case does not fall within the protection of the principle contained in *Cramp v. Hendricks*, 7 *Wendell*, 569. The money was advanced by way of *loan*, upon usurious interest; and the notes transferred simply, as collateral security. It is impossible to uphold this transaction without virtually repealing the statute. The collateral paper must abide the fate of the principal debt to secure which it was given; that being infected with usury, the whole is void as against these defendants. Then as to the title of the plaintiffs. They sold Whitaker a bill of exchange for cash: failing to make the advance, he afterwards transferred the notes to them simply for collection, the monies due thereon to be applied to their demand against him when collected. They are therefore the mere *agents* of Whitaker, and of course their title is no better than his. As the case stands, I think, the defendants were entitled to the verdict.

New trial granted, costs to abide the event.

[*235] **"TALMAGE & VAN PELT vs. THE FIRE DEPARTMENT OF THE CITY OF NEW-YORK."**

In an action by the Fire Department of the city of New-York, for the recovery of a *penalty* for keeping gun-powder beyond a certain quantity, within certain limits of the city, an *order* of the mayor and two aldermen directing the gun-powder to be *restored* to the owner, is not such an adjudication as may be given in evidence in bar of the suit; had an action been brought by the owner to try the question of *forfeiture of the powder*, and an adjudication made in his favor, *it seems* that such *adjudication* might be held as in the nature of an estoppel in the action for the pecuniary penalty.

ERROR from the New-York common pleas. The Fire Department

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brought an action of debt against Talmage & Van Pelt, in the court below, and on the trial claimed to recover a penalty of \$98,75, for having or keeping a quantity of gun-powder, exceeding 28 pounds in weight, in their store in the city of New-York, to the southward of Fourteenth street. *See Statutes of 1830, p. 352, § 24, 34.* A member of the Fire Department went to the store, and found there three casks of powder, weighing in all 75 pounds, which were delivered to him on demand, and conveyed to a magazine for storing powder. After the seizure, the mayor and two aldermen of the city, in pursuance of the 31st section of the act, inquired into the facts and circumstances of the case, and made an order in writing, that the powder be restored to the defendants. This order was offered in evidence by the defendants, first, as being conclusive evidence in their favor; and then as being evidence for them generally: but the court rejected the offer in both forms, and the defendants excepted. The jury found a verdict for the plaintiffs, and the defendants now bring error.

D. B. Tallmadge, for plaintiffs in error.

H. Ketcham, for defendants in error.

By the Court, BRONSON, J. The defendants insist, that the order of the mayor and aldermen for restoring the "property, was [*286] a judgment of acquittal in a proceeding *in rem*: and, as such, was conclusive, or at the least, proper evidence, between these parties.

The 24th section of the statute makes it unlawful for any person to have or keep any quantity of gun-powder exceeding twenty-eight pounds in weight, within certain specified limits in city of New-York; and the 26th section provides, that the offender "shall forfeit and pay the sum of one hundred and twenty-five dollars for every hundred pounds of gun-powder so had or kept, and in that proportion for a greater or less quantity; and all such gun-powder shall be forfeited to the Fire Department of the said city." *Statutes of 1830, p. 352.* There are two forfeitures—both, or either of which, may be asserted at the pleasure of the Fire Department. The pecuniary penalty must, of course, be recovered by action; but the mode of asserting the other forfeiture, is by seizing the property and storing it in a magazine, § 80; and then, if it be not restored in pursuance of the 31st section, the owner has an action against the Fire Department to try the question of forfeiture; but the action must be brought within three calendar months next after the seizure, or the property is "deemed absolutely forfeited." § 38, 84.

If the question of the forfeiture of the property had been "determined by due course of law," in pursuance of these provisions, the judgment

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would, perhaps, have been conclusive as an estoppel between the same parties, in this action for the pecuniary penalty. But an order made under the 31st section, is not equivalent to such an adjudication. That section provides, that the person making the seizure shall forthwith inform the mayor or recorder and any two aldermen of the city thereof; “and the said mayor or recorder and aldermen shall thereupon inquire into the facts and circumstances of such alleged violation and seizure; for which purpose they may summon any person or persons to testify before them, and they shall have power, *in their discretion*, to order any gun-powder so seized to be restored.”

Although the mayor and aldermen may order restitution of the [*237] goods on the ground that there has been no violation “of the statute, I think it equally clear that they may do so where a case of forfeiture is fully made out. They have power “*in their discretion*” to restore the property seized. This is something more than a *legal* discretion, governed by the sole consideration of forfeiture or no forfeiture—it is a discretion to restore the property in what may be deemed a hard case, where, although the penalty may have been incurred, there has been no gross violation of the statute. The 33d section makes a plain distinction between an order restoring the property, and a determination of the question of forfeiture “*by due course of law.*” A like distinction is also made in the 36th section. The case at bar was a fit one for the exercise of such a discretion as has been mentioned, and I entertain no doubt that the mayor and aldermen, in awarding restitution, proceeded on the ground that the defendants were entitled to a more favorable consideration than they could demand on a trial in a court of justice. But on whatever ground they proceeded, it is enough that it was not necessarily an adjudication upon the question of forfeiture.

Estoppel must, in general, be mutual, and yet it is quite clear that the defendants would not have been concluded on the question of forfeiture, if the mayor and aldermen had refused to restore the property. Every seizure is to be reported *forthwith*, to the mayor and aldermen; and those officers are *thereupon* to inquire into the facts and circumstances. § 31. If they do not order restitution, the owner still has an action to recover the property, on the ground that there has been no violation of the statute. § 33, 34.

An order for restitution, although not necessarily a decision upon the question of forfeiture, may have the effect of relieving the owner from the loss of the property seized; but it can, I think, have no influence in an action brought to recover the pecuniary penalty.

Whether the defendants are liable or not “upon the merits,” is a matter which cannot be examined on a writ of error. No other questions were discussed on the argument.

Judgment affirmed.

Utica, July, 1840.—*Judah v. Stagg's Ex'rs.*

**JUDAH vs. STAGG'S executors.*

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A judgment for *costs* against plaintiffs suing as *executors*, rendered by the marine court of the city of New-York, will not be reversed simply on the ground of the award of costs; the court will intend that the costs were awarded on *special application*, unless the contrary appears.

ERROR from the superior court of the city of New-York. S. Gilbert and J. Strang, executors, &c. of C. Stagg, brought an action of *assumpsit* in the marine court of the city of New-York, against S. B. H. Judah for services rendered by the testator in his life time for the defendant. The defendant pleaded the general issue and payment. The parties proceeded to trial and the plaintiffs were *nonsuited* and *costs* awarded to the defendant. The plaintiffs sued out a *certiorari* returnable in the superior court of the city of New-York. The marine court made a return setting forth the proceedings had before them and the evidence exhibited on the trial. The superior court *reversed* the judgment of the marine court, and ordered a new trial to be had in that court. Whereupon the defendant sued out a writ of error removing the record into this court. From the record returned to this court it did not appear that the justices of the superior court had annexed their decision and the reasons therefor, in writing, to the proceedings on file, as directed by the act of 1837; see *Statutes of 1837*, p. 538, § 3.

S. B. Helbert Judah, in pro. per.

G .K. Osborn, for defendants in error.

By the Court, Cowen, J. The parties have seen fit to bring this cause to argument without the reasons for reversal being returned by the superior court, as required by the statute of 1837, p. 538, 9, ch. 461, § 3. The omission is assigned for error; but the defect cannot be "taken" [*239] advantage of in that form. If either party, in such a case, desire that a written opinion be furnished, he should move for a rule that the superior court amend its return.

It can hardly be supposed that the superior court reversed the judgment of the marine court, on the ground that it was against the weight of evidence. *Stryker v. Bergen*, 15 *Wendell*, 490. *Noyes v. Hewitt*, 18 *id.* 141. That is not pretended by the counsel on either side. *

It seems to be admitted that the error relied on, was that the marine court rendered judgment against executor plaintiffs for costs. In this, it is insisted, *first*, that they were wrong on the 2 *R. S.* 511, 2d. ed. § 18. That section however, allows costs when it shall appear upon special application

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that the suit was wantonly brought, or brought or conducted in bad faith. *Non constat* but they were awarded on such application ; and I think it must be intended they were, till the contrary be shown. A court having jurisdiction, and having acted according to it, is always entitled to claim the benefit of the rule *omnia præsumuntur legitime facta, donec probetur in contrarium* ; and this rule was applied in *Mulheran's ex'r's. v. Gillespie*, 12 *Wendell*, 349, a case in principle the same as the present. There error was brought because costs were awarded by the N. Y. com. pleas against executor defendants without a special application. Nothing being said in the return, one way or the other, about a special application having or not having been made to the court below, this court intended that it was made. The question whether costs should be allowed was there said to be one of regularity ; not error. That being so, it must begin and end with the court where it is made. It is a matter of discretion arising on motion. I speak of the question as it stands on the general rule. On *certiorari* from a justice's court, where the affidavit shows that no application was made, or that the facts disclosed gave no color for costs, and the court return specially that this is so, according to the statute concerning this peculiar sort of *certiorari*,

I do not deny that the court of error may act upon the matter, [*240] if it form an objection in its own nature. *Until that be done, however, the general rule of intendment remains as well in favor of a justice's court as any other.

I speak on the assumption, that the general statute of costs applies to the marine court ; and this is giving the present plaintiff in error his most favorable ground. It is quite clear, I think, that executors suing in the marine or other justice's court, must submit in all cases on being defeated to a judgment for costs *de bonis propriis*, like other parties plaintiffs, unless they can show themselves excepted by some provision in the particular act by which the court is instituted. *Vid. Wells v. Newkirk*, 1 *Johns. Cases*, 228. *Per Kent, C. J. in Blake v. Millspaugh*, 1 *Johns. R.* 317. No such exception has been pointed out, though counsel were referred to the 2 *R. L.* (1813) p. 390, § 133, by which costs are given generally. We are not aware of any exception, though there is such constant and scattered legislation in respect to our various justices' courts that it is impossible to recollect it in all its departments. Again, if the error lay solely in giving costs, the judgment should have been for a reversal in this respect only.

We are of opinion that the superior court erred ; that their judgment must be reversed, and that of the marine court affirmed.

Utica, July, 1840.—*Nicolet's Admr's v. Pillot.*

NICOLET'S ADMINISTRATOR vs. PILLOT & LE BARBIER.

Where an agent was directed by his principal to obtain *securities* for the payment of *protested notes*, and to hand them over when obtained to certain creditors of the principal, and the agent not having obtained new securities handed over the notes to the creditors, it was held that their title to the notes was good, and that an action of *trover* would not lie against them at the suit of the *administrator* of the principal, notwithstanding that the notes were delivered over *after the death* of the principal ; the death of the principal under the circumstances of the case being deemed *not a revocation* of the power of the agent.

ERROR from the superior court of the city of New-York. Benjamin Clapp, administrator, with the will annexed, of **Theodore Nicolet* deceased, brought an action of *trover* against *Pillot* and *Le Barbier* for four promissory notes amounting together to the sum of \$7,473, 13, under the following circumstances : *Nicolet*, a merchant residing at *New-Orleans*, had, through his agent *R. Braem*, of New-York, purchased of the house of *Mansing, Munroe & King*, of New-York, a number of promissory notes payable at future days : one, a note for \$772,87, given by Thomas Graves & Co. payable at *Jackson*, in Mississippi, on the 23d January, 1837, and three others payable at *Vicksburg*, on 1st April, 15th May and and 24th May, 1837, which notes were endorsed by *Lansing, Munroe & King*. On 12th April, 1837, *Braem* received a letter from *Nicolet* dated 2d April, enclosing the note of T. Graves & Co. protested for non-payment, desiring him to claim the amount and place it to his (*Nicolet's*) credit in account with *Pillott & Le Barbier*. On the first May, 1837, *Braem* received another letter dated 22d April, 1837, from *Nicolet*, who transacted business under the name of *Th. Nicolet & Co.*, in which he says, " We flatter ourselves that by this time you have succeeded to obtain good guaranties from Messrs. *Lansing, Munroe and King*, and now request you hereby to hand over for our account to Messrs. *Pillot and Le Barbier* of your city," and adds that he supposed that *Braem* was already in funds for the protested note of T. Graves & Co. and directed him to hand over the amount to *Pillot & Le Barbier*. To which letter was attached a P. S. in these words : " Our understanding is that you shall hand over without any delay whatever, to Messrs. *Pillot & Le Barbier* for our account with them, all the guaranties obtained from Messrs. *Lansing, Munroe and King*." *Braem* also received from *Nicolet* a letter dated 25th April, 1837, in which, after mentioning that a certain house in Natches declined to take up T. Graves & Co's note, he says, " We consequently confirm you what we on the 22d inst. had the honor to mention in relation to that note, and reiterate our entreaty to hand over for our account, to Messrs. P. & Le B. all what you may have been able to get possession of, as guaranteees in this unfortunate transaction." "When notice of the protest of the note of T. Graves & Co. was received, *Braem* called upon Messrs. *Lansing, Munroe*

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& King to pay it or give good securities or guaranties for it, and such other of the notes as might be protested, and they promised to give such securities or guaranties as soon as the protested notes should come on from the south. On receipt of *Nicolet's* letter of 22d April, Braem again called upon the firm of Lansing, Munroe & King, who renewed their promise to consummate the arrangement as to the guaranties for such of the notes as had been or might be regularly protested, whenever the same should be delivered to them. The letter from Nicolet to Braem, of 22d April, was *enclosed* in a letter from Nicolet to Pillot & Le Barbier, also dated 22d April, in these words : “ Enclosed is a letter for Mr. Braem, of your city, by which we order him to place in your hands from account, all the securities which he may obtain or shall have already obtained from Messrs. Lansing, Munroe & King of your place, on account of an exchange transaction we have had with them.” *Pillot*, one of the firm, delivered to *Braem* the letter directed to him, and it was then agreed by *Braem* that he would hand over to Pillot & Le Barbier the securities or guaranties referred to in Nicolet's letter as soon as they were received. On 2d May, *Braem* wrote *Nicolet*, acknowledging the receipt of the letter of 22d April, and promising to comply with its requirements. On the *third* day of *May*, Nicolet died at New-Orleans, and having left a last will and testament, his executor, *T. B. Blanchard*, on the 5th May, proved the will, and on the 16th May, letters testamentary were granted to the executor. On 23d May, *Blanchard*, wrote *Braem*, enclosing to him the *four notes in question* in this case, and desiring him to obtain payment of the same from Messrs. Lansing, Munroe & King : this letter was received by *Braem* on the *sixth* day of *June*. On the 27th May, *Blanchard* again wrote to *Braem*, informing him that Messrs. Pillot & Le Barbier had written to him demanding the fulfilment of the promise of *Nicolet* concerning the notes forwarded on the 23d May, and then observ-
[*243] ing *that his duty as administrator of the estate would not permit him to accede to such demand, he being bound to keep all the assets of the estate for the benefit of the creditors at large, he *forbade him to part with any values* : this letter was received by *Braem* by the express mail on the *fifth* day of *June*. On the *tenth* day of *June*, not having received any new securities or guaranties from Messrs. Lansing, Munroe & King, *Braem* delivered the notes in question to Messrs. *Pillot & Le Barbier*. It was admitted that *Nicolet*, at the time of his decease, was indebted to the defendants in a sum exceeding \$30,000. The presiding judge charged the jury that the death of *Nicolet* did not vary or affect the rights the defendants possessed in the notes in controversy ; and that the delivery of the notes by *Braem* to the defendants was, under the circumstances, a substantial compliance with the instructions of *Nicolet*. To which charge the plaintiff's counsel excepted. The jury found a verdict for the defendants,

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upon which judgment was entered. The plaintiff sued out a writ of error.

S. A. Foot, for the plaintiff in error, insisted that the authority of *Braem* was revoked by the death of *Nicolet*; and if not, that *Braem* exceeded the power conferred upon him by delivering up the notes, when his authority only extended to delivering to the defendants such securities or guaranties as he should obtain from the endorsers of the notes.

F. B. Cutting, for the defendants in error.

By the Court, NELSON, Ch. J. The judgment of the court below, I am of opinion, is correct. The letters of *Nicolet* of 2d, 22d and 25th April, amounted, in legal effect, to a virtual assignment of the notes in question to the defendants for a valuable consideration. That was obviously the understanding and intent of all parties concerned. In respect to *Nicolet*, it is too frequently and earnestly expressed in his correspondence to be mistaken for a moment. He had failed to fulfil his engagements with the defendants' house, knew they were laboring under heavy advances by reason thereof, "at a period of great commercial embarrassment, and was [*244] endeavouring, with commendable sensibility and zeal, to relieve them. The notes previously bought of Lansing, Munroe and King and endorsed by them, (several of which were then due, and protested,) were, at once, turned over for that purpose, with urgent directions to his agent to procure guaranties from the endorsers. These notes *Nicolet* supposed might be made available securities to the defendants; he also knew the endorsers were within their reach. They were, doubtless, the best in his power to offer at the time.

It was said on the argument, that the agent was not directed to transfer the notes, *eo nomine*, but only the guaranties. This is a criticism upon words without regard to the substance of the transaction. The collateral securities would be valueless, unaccompanied with an interest in the notes; it is impossible to separate them and give any legal effect to the obvious design of the parties. If the notes were paid, on presentation, by the endorsers, the money was directed to be applied on account; if not, guaranties were to be procured and delivered over. The fund appropriated was the notes—they were assigned, if any thing.

If the above view be correct, then the death of *Nicolet* becomes unimportant in respect to the rights of the defendants, as it could in no manner affect their title, which became perfect by the transfer of the interest in the notes. Manual delivery at the time was not essential for this purpose.

Judgment affirmed.

Utica, July, 1840.—Pearson v. Williams' Administrators.

PEARSON vs. WILLIAMS' ADMINISTRATORS.

Where a party, in consideration of another having conveyed to him 14 city lots for *only* \$21,000 *covenanted* that he would by a certain day erect two brick houses of specified dimensions, or, in default thereof, pay to the grantor *on demand*, after the specified day, the sum of \$4000: it was held, that the sum specified was not a *penalty*, that it should be deemed part of the contract price of the lots, and that on failure to erect the houses, the *covenantee* was entitled to recover the specified sum, and should not be limited merely to *damages* for the non-erection of the buildings.

[*245] *ERROR from the superior court of the city of New-York. The administrators of Williams sued Pearson in the court below, and on the trial gave in evidence a *covenant* in the following words: "In consideration that Cornelius Tiebout Williams, for the consideration of twenty-one thousand dollars *only*, has by deed of this date conveyed to Isaac Green Pearson *fourteen* lots of land in the twelfth ward of the city of New-York, to wit, seven on the northeasterly side of Sixteenth-street, and seven on the southwesterly side of Seventeenth-street, containing, when taken together, in each of those streets, one hundred and seventy-five feet front, and distant one hundred and twenty-five feet east of Union square place, and one hundred and twenty-five feet west of Irving place: Now therefore, the said Isaac Green Pearson doth hereby *covenant* with the said Cornelius Tiebout Williams, that he will, with reasonable diligence, remove off from the said lots the surplus earth and stone above the corporation level; and *further*, that *he will erect*, or cause to be erected, on or before the first day of May, 1836, on some part or parts of the said lots, *two brick houses*, each not to be less than twenty-five feet front nor less than forty feet in depth, and not less than two stories in height, or in *default in erecting such houses* as above mentioned, the said Isaac Green Pearson *will pay* to the said Cornelius Tiebout Williams, or his executors or administrators, *on demand*, after the first day of May, 1836, the sum of *four thousand dollars*. New-York, June 26, 1834." It was admitted that the houses mentioned in the covenant were not either of them erected by the first day of May, 1836, the foundations not having been laid, and that the surplus earth was only partially removed from the lots; and it was likewise admitted that the plaintiffs demanded on the third day of May in the year one thousand eight hundred and thirty-six, the sum of four thousand dollars mentioned in the covenant, which the defendant refused to pay. The judge decided that the \$4000 was to be considered as *liquidated damages*; to which opinion the defendant excepted, and judgment having passed against him for that sum, he now brings error.

[*246] *J. Prescott Hall, for plaintiff in error.

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W. Betts, for defendants in error.

By the Court, BRONSON, J. The defendant, in consideration that the intestate sold him fourteen lots of land for the sum of twenty-one thousand dollars *only*, covenanted to do two things—*first*, to remove from the lots the surplus earth and stone above the corporation level, within a reasonable time; and *second*, to erect two brick houses upon the lots by a specified day; or, in default of erecting such houses, to pay the intestate four thousand dollars, when afterwards demanded. So far as this action is concerned, we may lay the first branch of the covenant, which relates to the surplus earth and stone, entirely out of view. It is a distinct stipulation, which cannot affect the remaining branch of the covenant.

The case then comes to this: The defendant, for a specified consideration, agreed that he would erect two brick houses on the lots by a certain day, or in default of doing so, would afterwards pay the intestate four thousand dollars on demand. This was an optional agreement. The defendant had the choice of erecting the houses by the day; or of omitting to do so, and then paying the specified sum of money. He made his election by omitting to build within the time. The obligation to pay the four thousand dollars, thereupon became absolute; and the plaintiffs were, I think, entitled to recover that sum, with interest from the time of the demand.

This does not belong to the class of cases in which the question of liquidated damages has usually arisen. It will be found in most, if not all, of those cases, that there was an absolute agreement to do, or not to do, a particular act, followed by a stipulation in relation to the amount of damages in case of a breach; and in declaring upon the contract, the breach has been well assigned by alleging that the party did, or omitted to do, the particular act. But here, there is no absolute engagement to build the houses. It was optional with the defendant whether he would build them or not; *and there would have been no sufficient breach, if the plaintiffs [*247] had stopped with alleging that the houses were not built. This is not a covenant to build, with a liquidation of the damages in case of non-performance; but it is a covenant to build within a specified time, or afterwards to pay a sum of money. The money is not to be paid by way of damages for not building the houses; but is to be paid, if the houses are not built, as part of the contract price for the lots conveyed by the intestate.

Again: this is not simply an alternative covenant, to build, or pay a sum of money, within a specified period. If it were so, the question of damages would, perhaps, be open. But it is an agreement to build by a certain day, or *afterwards* pay a sum of money. When the day for building had gone

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by, it was then merely a covenant to pay money. It was necessary, in declaring, to allege that the houses were not built—not, however, because that part of the contract was any longer in force—but by way of showing that the event had happened which the defendant agreed to pay the money. It had now become a simple covenant to pay money; and like other cases where there is an agreement to pay a gross sum of money, that sum, with interest from the time it became payable, forms the measure of damages.

Let us reverse the order of these stipulations, and suppose that the defendant had agreed to pay the intestate four thousand dollars by a particular day, or in default of so doing that he would afterwards build the houses. The defendant might then have discharged himself by the payment of the money by the day; or he might, at his election, suffer the day to pass, and then build the houses. If he did neither, the intestate would have an action; but the question of damages would turn wholly on the agreement to build. The enquiry would be, either how much was it worth to build, or how much has the intestate lost by the neglect. The day for paying the four thousand dollars having gone by, that clause of the covenant could have no possible influence upon the question of damages. The recovery might be either more or less than that sum. In short, the intestate [*248] would recover damages for not building, whatever those damages might appear to be. So here taking the stipulations in the order in which they stand in the contract, the question of damages turns wholly on the agreement to pay the four thousand dollars in a certain event. The event having happened, the plaintiffs are entitled to that sum, without any reference to the fact that the defendant might at one time have discharged himself by building the houses.

We have no right to call this sum of four thousand dollars a penalty, or say that it was inserted in the contract for the purpose of ensuring the erection of the houses. There is nothing in the covenant which will warrant such an inference. We are to read the covenant as the parties have made it; and then it appears that this sum of four thousand dollars was not inserted for the benefit of the intestate, but as a privilege to the defendant. The intestate had no option, but the defendant had. He was at liberty to discharge himself from the covenant by building the houses, if he deemed that course most for his interest or convenience; or he might elect, as he has done, to omit building and pay the money. So far as we can judge from his acts, he deems that course most beneficial to himself.

Whether the plaintiffs, or the persons whom they represent, will be better off if they get the money, than they would have been had the houses been put up, must, from the nature of the case, be a difficult question to decide; and that is one reason why the parties should be left to settle the matter for themselves, as they have done by the contract. But if we could see clearly,

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that the building of the houses would have been of little importance to the plaintiffs, that could not alter the case. *Astley v. Weldon*, 2 Bos. & Pul. 346. *Daikin v. Williams*, 12 Wendell, 447.

Although I have said something on that subject, we are not, I think, at liberty to speculate upon the probable consequences of holding parties to their agreements. So long as they keep within the boundaries of the law, and practice no fraud, our business is to see that their contracts are enforced. We have no dispensing power.

Judgment affirmed.

*THE PEOPLE *vs.* THREE OF THE JUDGES OF SUFFOLK [*249]
COUNTY.

An order of commissioners of highways of a town in one of the counties of Long-Island, to close a road on condition that proper swing-gates were made and supported, made on a petition for the discontinuance of the road, supported by the oaths of 12 freeholders that the road had become useless and unnecessary, is a void order: the commissioners not being authorized to make the order upon such application.

So, an order of commissioners subsequently made directing the gates and fence to be removed, and that the road should be of the width it had previous to being enclosed, is equally void: the first order being a nullity, required no act on the part of the commissioners to vacate it. So, an order of three judges, to whom an appeal was made from the second order, reversing so much thereof as directed the road to be restored to its original width, instead of ordering it to be opened only three rods wide, (the original width being from seven to nine rods,) was also held to be void; the judges in such case having no jurisdiction.

The remedy of parties aggrieved under the second order of the commissioners, was not by appeal to the judges, but by impeaching it collaterally, or by certiorari directed to the commissioners.

The papers in this case were entitled, *The Commissioners of Highways of the town of Southampton, v. The Judges of Suffolk County*; it seems, they should have been entitled *The People v. Three of the Judges of Suffolk County*.

CERTIORARI. The commissioners of the town of Southampton, in the year 1833, on the petition of three individuals to have a certain road discontinued and closed up: which petition was supported by the oaths of twelve freeholders that the road had become useless and unnecessary as a public highway, made an order allowing the petitioners to close the road, provided good and easy swing gates were made and supported at the cost and charge of the petitioners: the commissioners declaring the highway to be for the use of the public as a passing road. The road was of the width of from seven to nine rods. On the first day of May, 1838, the commissioners of highways of Southampton, for the time being, made an order whereby (after reciting the order of 1833 in respect to the road above referred to,) and that application had been made to them by sundry freeholders of the town, that

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[*250] the road might be made an *open road*, and that as such, it was necessary for the public convenience, "directed the *gates and fence to be removed*, so that the highway be opened and unobstructed, and that the breadth of the road should be as it was before it was enclosed. On the 17th July, 1838, two of the petitioners for the order of 1833, appealed to three of the judges of Suffolk, from the order of 1st May, 1838, praying a reversal of the latter order, or at least of so much thereof, as directed the road to be opened to the width it had, previous to its being closed, instead of limiting its width to *three rods*. In pursuance of this appeal, the judges met and viewed the premises, and after hearing the proofs and allegations of the parties, made an order, that so much of the order of 1st May, as directed the road to be opened to the *breadth it was of*, before it was enclosed, instead of ordering it to be opened three rods wide, only, be reversed. A *certiorari* was issued to the judges, commanding them to send up the proceedings and on the coming in of the return, a motion was made to quash the order of the judges, on the ground that they had not *jurisdiction* under the highway laws relative to the counties on Long-Island, viz: the counties of Suffolk, Kings and Queens.

S. S. Gardiner, for plaintiffs in error.

A. T. Rose, for the defendants in error.

By the Court, COWEN, J. The order of 1833 was not made under the 93d section of the act regulating highways, &c. in the counties of Suffolk, Queens and Kings. 3 R. S. 243, 255, 2d ed. *Sess. Laws of 1830*, ch. 56, p. 42. That section authorizes the commissioners, where a highway leads to any public landing, mill or meadow, through any person's land, to consent in writing that such person may hang good easy swinging gates on such highway, and keep the same in repair at his or her cost and charge. The application was not for a written consent; it was by three persons, not calling themselves owners of the land through which the road ran, and with them were joined twelve sworn freeholders, all soliciting a *discontinuance* of the **road*. Nor does it anywhere appear in the proceedings that the road led to any public landing, mill or meadow. On the contrary, the application was under and in the language of the 64th section for a *discontinuance* of the old road, on the ground that it had become useless and unnecessary. All that the commissioners had power to do was to consider and decide upon that application. They stated in their order that they had, on the application as being one to *close or shut up* the road, viewed the premises, and ordered and allowed it to be *closed*, *provided good, easy swing gates be made and supported*, &c. The order does not fol.

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low the statute. It is loose in describing the object sought by the application, and neither ordered the road to be continued or discontinued. Instead of that, it ordered the petitioners to close the road in a qualified manner, by erecting gates—the road still to be used by the public.

In considering this proceeding, we can look to the order only and the application to which it refers; and the best consideration I have been enabled to bestow upon it, has led me to think it was merely void. Under the 64th section, the commissioners had no power except to *consider* and *decide* upon the *application*, i. e. simply to adjudge that the road should be *discontinued*, or that it should not. Had they stopped with saying it should be *closed*, we might possibly have holden the order equivalent to an adjudication that the road should be discontinued. We might have regarded the order as a substantial mode of granting the application to which it referred. We might have gone upon the intention, though it is always better for judicial officers executing powers specifically conferred by a statute, to follow its words. Here there is no room, however, to speculate on the meaning. The order declares that they did not mean to *discontinue* the road, but sought to bring the case under the 93d section; and the main question debated by learned counsel is, whether it was under that or the 64th section. I think it was authorized by neither; that therefore the road still continued open, and might have been travelled as it was before. This conclusion will be seen to accord with the following authorities. *Davison v. Gill*, 1 *East*, 64. *The King v. Kenyon*, 9 *Dowl. & Ryl.* 694; 6 [*252] *Barn. & Cress.* 640, *S. C.* *The King v. Crewe*, 3 *Dowl. & Ryl.* 6. *The same v. The Justices of Kent*, 1 *Barn. & Cress.* 168, being *S. C.* with that in 3 *Dowl. & Ryl.* *The King v. The Justices of Somersetshire*, 8 *Dowl. & Ryl.* 733; 5 *Barn. & Cress.* 316, *S. C.*

Then came the order of the first of May, 1838. This expressly recited the former order of 1833, as one intended to *enclose* the road by *hanging easy swinging gates*, &c. and *leaving a passage through*. That was according to the true intent; and the last accordingly concludes, by ordering that the *said gates and fence be removed, so that the said highway be opened and unobstructed, and of the same breadth it was before enclosed*. Of course, this order too was merely void. It could have no operation; for it professed to order a thing which the law had already done; to open a road which was already open.

Then from this mere nullity, an appeal is instituted to the judges, of which I think they could have no cognizance in any view. If it were a proceeding under section 93, to remove gates which had ceased to be proper, then it is conceded that no appeal lay; that the only section giving an appeal (§ 66) does not cover the consent to erect or direction to remove gates under the 93d section. On the other hand, not being an order which the com-

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missioners had power to make under any other section, an appeal was equally inapplicable. Suppose the effect of the order of 1833, were to *discontinue*, and that of May, 1838, were intended to *lay out* a road over the ground which had reverted to the owners in virtue of the first order: no consent of the owners is recited in the last, nor any petition of freeholders, as required by the 47th section.

An appeal to three judges does not lie from a determination which is void for want of jurisdiction. The original order being *coram non judice* and void, is no more the subject of such an appeal than would be a judgment rendered by the commissioners in a civil action. An excess of jurisdiction is correctable by *certiorari* only. On an appeal, want of jurisdiction in the court below is equally a want of it in the appellate court. Suppose a justice of the peace were to try and decide an action of ejectment: would the common pleas have power to review the proceeding on appeal? Clearly the whole would be void. Being out of the statute, the only direct proceeding for redress would be by *certiorari*. For this there would be no strict necessity, because the judgment might be regarded as a nullity, and impeached collaterally. Still this court would perform what is the main office of a *certiorari*, the keeping of inferior magistrates within the compass of their power. We should, therefore, reverse the judgment of the magistrate. We might have reversed the order of the commissioners to remove the gates as an unwarrantable assumption of power. The case of *The King v. The Justices of Somersetsire*, 8 Dowl. & Ryl. 733. 5 Barn. & Cress. 316, S. C. is an instance. *Vid.* a notice of this case in 2 Chit. Gen. Pr. 220, and in Woolr. on Ways, 187. I mention that case, because it was a question arising on an order professing to be under a highway act. The petty sessions had taken original cognizance of a surveyor's accounts, whereas their powers were appellate only. The K. B. said the whole proceeding was *coram non judice*; and therefore quashed the order, though the statute gave an appeal and expressly forbade a *certiorari* in all cases arising under it. The books are studded with cases of *certiorari* grounded on excess of jurisdiction, in divers departments of the law. The writ here is in nature of a *special quo warranto*, to ascertain by what authority a particular judicial act is done. The writ goes on the assumption, that powers have been usurped; and the proceeding is, in England, always considered as at the suit of the king. It is so entitled and should here be entitled *The people against the magistrates*.

The three judges being entirely destitute of jurisdiction in either of the views which I have taken, it follows that this *certiorari* was properly brought. Indeed the public has a right to complain that a real injury was attempted in that part of the judges' order which seeks to narrow the road.

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The people and individuals have a right to insist, that all the questions under the act shall first be heard in "due form by the commissioners, being there presented in their true character, to the end that it may be seen whether orders are within the statute. If they are not, or if they be not within the section allowing an appeal, the judges have no power of review; and especially are they without power to act as a court of original jurisdiction by modifying an order which is void. That having been attempted in this case, the judges exceeded their jurisdiction; the proceeding in question was *coram non judice*, and their order must be quashed.

Order of the judges of Suffolk county quashed.

MILLS vs. BAEHR'S EXECUTORS.

A provision in a *lease* that the rent shall cease if the premises become untenantable by *fire or other casualty*, does not extend to the case of a building, in the city of New-York, becoming untenantable in consequence of the greater portion of it being taken down, to conform to an order of the corporation for the widening of the street on which it is situate.

ERROR from the New-York common pleas. This was an action of covenant, for the nonpayment of rent. The premises demised consisted of a lot situate at the corner of *Wall* and *Pearl* streets, in the city of New-York, being 20 feet 3 inches on *Pearl*, and 53 feet 5 inches on *Wall street*, for the term of *eight years*, from 1st May, 1830, subject to an annual rent of \$3000, payable quarterly. The covenant for payment of the rent contained an *exception* in these words: "It being understood that if the premises shall become untenantable by *fire or other casualty*, that the rent shall cease while they so remain." In 1836 *Wall street* was widened by an order of the corporation of the city of New-York, and a large portion of the demised premises taken for that purpose, leaving the lot reduced to the following dimensions, viz. in front on *Pearl street*, 3 feet 8 inches; in rear, 6 feet 11 inches; in length on *Wall street*, 40 feet 3 inches, and on the opposite side 40 feet 6 inches. On 27th October, 1836, the corporation ordered the removal of so much of the building as covered the ground to be taken "into *Wall street*, and on the 1st [*255] November, 1836, the *tenant* removed from the premises, but did not surrender them to the landlords. The commissioners of estimate and assessment awarded to the *tenant* for his *damages* occasioned by the widening of the street \$3000, and to his *under tenants* \$2800. The value of the reduced lot was estimated at from \$15,000 to \$30,000. With the use of the old materials, valued at \$1000, a new building might have been erected in the course of 6 or 7 weeks at a cost of \$2000, which would have

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rented for \$1000 *per annum*; or the building on the premises might have been made to conform to the new line of the street at an expense of from \$800 to \$900, and the building would then have rented for upwards of \$1000 *per annum*. Without a building the lot in its reduced state was worth nothing to the tenant. The plaintiffs demanded 2250, being the three quarters rents accruing between the first day of November, 1836, and the first day of August, 1837. The cause was heard by referees, who reported the sum of \$375 to be due to the plaintiffs, and their report was confirmed by the common pleas and judgment rendered for the plaintiffs. The defendant sued out a writ of error.

T. Sedgwick, for the plaintiff in error.

W. Mitchell, for the defendants in error.

By the Court, NELSON, Ch. J. It is apparent from the language of the exception in the covenant to pay the rent, that it does not reach a disturbance of the premises by the proceedings of the corporation of New-York, relating to the widening and opening of streets. The term "other casualty," refers to some fortuitous interruption of the use. This is clear, not only upon the import of the words, but from the connection in which they are found. No *casualty* has intervened. On the contrary, whatever has taken place, has been in pursuance of established law, and might have been, and probably was, anticipated. Neither does the interpretation [*256] come within the spirit or intent of the "exception. In judgment of law, the widening of streets in the city works no injury to the lessee. Full compensation is made for all damages sustained. Nearly \$6000 have been awarded in this case to him and his sub-tenants, for the disturbance. The principle upon which such compensation is to be made, will be found in *Gillespie v. Thomas*, 15 Wendell, 464; and it will be seen that in the distribution between the landlord and tenant, the latter is still to pay a rateable rent for the portion of the premises not taken for the improvement.

But it is insisted that according to the evidence, the remaining premises for the unexpired term were of *no value*. That was a question of fact for the referees, and their determination cannot be reviewed on error. It was conceded if *any* value was shewn, the amount could not be questioned; but whether any value or not, is equally a question of fact. The case shews, the building might have been cut down to conform with the new line of the street, and repaired so as to have rented during the unexpired term for a sum exceeding the expense.

Judgment affirmed.

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BUSH vs. STEVENS & KENDLE.

Where a party enters into an obligation *under seal* for the debt of another it is not necessary to allege any consideration.

When, however, the covenant is, to pay *on request*, a *special request* must be alleged in the declaration ; the general allegation of *sepe requisitus* is not enough.

DEMURRER to declaration in covenant. The first count alleges that *Thomas Peele*, on the 18th July, 1835, became bound to the plaintiff in a bond, conditioned for the payment of \$2529,29, by instalments, specifying the times, with interest ; and that the defendants on the same day *covenanted* with the plaintiff, that in case *Peele* should not pay the money according to the condition of the bond, the defendants would pay the same *on request*. *Breach*, that "afterwards, to wit, on the 15th July, [*257] 1837, at, &c. a large sum of money, to wit, \$1400, became, and was due and payable to the plaintiff on the bond, which Peele neglected and refused to pay, of which the defendants then and there had notice ; yet the defendants, although often requested so to do, have not paid, &c. but have hitherto wholly refused, &c. The 2d, 3d and 4th counts were substantially like the first, except as to the covenant of the defendants, which was, that *Peele* should pay to the plaintiff the moneys specified in the condition of the bond, according to the terms thereof. The defendant, *Stevens*, demurred to the 2d count, and to the breach alleged in the 1st, 2d and 4th counts, and the plaintiff joined in demurrer.

S. Stevens, for the defendant, contended ; 1. That the undertaking of the defendants *Stevens* and *Kendle* being to answer for the debt of a third person, the consideration inducing them to enter into the obligation should have been set forth in the declaration ; 2. That the bond of *Peele* being for the payment of a sum of money by instalments with interest, it was incumbent upon the plaintiff to have specified the instalments claimed in the action brought ; and 3. That as the defendants only engaged to pay *on request*, a *special request* ought to have been alleged.

A. Taber, contra.

By the Court, BRONSON, J. I. Although this was a *collateral undertaking*, the *seal* imports a consideration, and none need be alleged in pleading. This question was fully considered at the last term.

II. The whole of the money mentioned in the condition of the bond was due at the time specified in the breach, and it is enough that the plaintiff has stated how much was due and in arrear, without specifying what portion of it was for principal and what for interest.

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III. The objection that there should have been a *special* request only applies to the first count. The covenant in that count is, that if [*258] Peele does not pay the money according "to the condition of the bond, the defendants will pay it *on request*. The breach alleged is, that Peele did not pay, of which the defendants had *notice*; and that *although often requested so to do*, they have not paid. There should have been a special request.

Judgment for plaintiff on second, third and fourth counts, and for defendants on first count.

BROWNING *vs.* WHEELER.

In an action on an *award* in pursuance of a submission under seal, it is not necessary to allege in the declaration that the arbitrators were *sworn*.

Whether the provision of the statute requiring arbitrators to be *sworn* extends to a common law submission, *quere*.

Whether the omission of administering an oath to the arbitrators, even where the submission is under the statute, can be pleaded in defence to a suit at law, *quere*.

DEMURRER to declaration. The action was covenant on an award, pursuant to a sealed submission to two arbitrators of matters in litigation between the parties. The submission provided for an umpire, in case of disagreement, and contained mutual covenants to abide by the award. The declaration set out an award by the umpire that the defendant should pay to the plaintiff \$1111,17, with certain costs to be taxed—for the recovery of which sums this action was brought. The declaration did not state that either the arbitrators or umpire were sworn, and for this omission, the defendant demurred.

E. Clark, for the defendant.

P. H. Sylvester & R. De Witt, for the plaintiff.

By the Court, COWEN, J. It is not necessary to decide the question whether the 2 *R. S.* 446, 2d ed. § 4, be applicable to a common proceeding by arbitration. That section requires that the arbitrators shall be sworn. I should think the provision was intended of those cases [*259] only where, "by the same statute, a judgment may be summarily entered on the award; though, upon the *dicta* in *Wells v. Lain*, 15 *Wendell*, 99, and *Bloomer v. Sherman*, 5 *Paige*, 575, counsel seem to think this may be a vexed question. But conceding that the 4th section

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reaches the case of a mere common law arbitration, it is not necessary to aver in declaring on the submission and award that the arbitrators were sworn. This is not a jurisdictional fact. At least, until the contrary appear, it must be intended they were sworn, or that the parties waived the ceremony by not objecting, or by positive consent. Jurisdiction means legal power to make a judicial decision. That, in the case of arbitrators, is conferred by delegation from the parties. The act is of the same nature as the appointment of an agent; and after the power is thus conferred, even positive corruption or breach of trust will not raise a right of defence against an action at law.* The statute also directs that judges shall be sworn. Yet, in an action on a judgment, who ever heard of a direct averment, in declaring that such was the fact? The allegation that judgment was rendered by such or such a court, is in itself an averment that the court had jurisdiction. No jurisdiction, no court. The averment that arbitrators made an award, means *qualified* arbitrators. Whether it can be shown collaterally by plea in an action on the award that the oath was omitted, is another question. But, reasoning from analogy, it could not, even assuming that an oath is necessary. You cannot plead that the judges were not sworn in an action on judgment. It is enough that they were judges *de facto*. *A fortiori*, I should suppose, as to judges *de facto* of the parties own choosing, who have acted within the scope of the powers expressly conferred. It is enough, however, upon the question before us to see that setting forth those powers, and showing that they were followed, are all the preliminary allegations which are necessary in a common law action.

Judgment for plaintiff on demurrer.

**Quere.* See *Elmendorf v. Harris*, 23 Wendell, 628.

*SEAMAN and others, vs. WHITNEY.

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An action for *money had and received*, will not lie by a creditor against a *third person*, in whose hands funds have been deposited by a debtor, with directions to *pay them over* to the creditor in extinguishment of a debt, unless there be an agreement either express, or to be implied from the circumstances of the case, by which the funds become the property of the creditor so that the debtor loses all control over them, and is disabled from giving them another direction; or unless the money be deposited with the concurrence of the creditor, expressed previous to its receipt by the agent.

THIS was an action of *assumpsit*, tried at the New-York circuit, in June 1837, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiffs declared on the *common money counts*. They were the holders of a promissory note, drawn by *Samuel S. Hill*, dated 17th August,

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1835, for \$8157,48, payable to their order at the Broome County Bank, sixty days after date. They had the note discounted at the *Phoenix Bank*, in the city of New-York, which bank sent the note to the Broome County Bank for collection. On the 19th October, when the note fell due, it was protested for non-payment, and on the 29th October, the plaintiffs took it up. The maker of the note to provide funds for its payment, had placed in the hands of the defendant, an accepted draft drawn by him on J. & C. J. Manning, for \$8200, payable to the defendant. On the 23d September, the defendant endorsed the draft, and procured it to be discounted at the *Towanda Bank*, in Pennsylvania, and on the 7th October, received the avails thereof, viz : \$8189,23. Previous to the 19th October, 1835, the defendant placed in the hands of an agent sufficient funds, and directed him to take up the note of the 17th August, 1835, but subsequently withdrew them, and applied them towards payment of a demand, he himself had against Hill. The judge refused to nonsuit the plaintiffs, and charged the jury that if they believed that the defendant on receiving the draft on J. & C. J. Manning, promised to pay the note in question, the draft constituted a *trust fund* in favor of the holders of the note, and of the parties [*261] "to it who might afterwards be compelled to pay it, or who should become the owners of it after it fell due ; and that the plaintiffs having paid, and taken up the note after it was protested, an action for money had and received, lay in their names against the defendant, to recover the amount of the draft. To which charge the counsel for the defendant excepted. The jury found for the plaintiffs, to the amount of the draft and the interest thereof. The defendant moves for a new trial.

J. S. Bosworth, for the defendant.

J. Slosson, for the plaintiff.

By the Court, NELSON, Ch. J. No case heretofore decided has gone the length of maintaining this action, nor can the verdict be placed upon any acknowledged principle in the law.

At most, it is an attempt by a creditor to seize upon a fund placed by his debtor in the hands of a third person with directions to apply it in payment of a debt without any communication with the creditor, or understanding between them to that effect. Whatever may be the claim in equity to enforce the appropriation, clearly none such can be set up in a court of law. The creditors here shew no privity in respect to the transaction with either the debtor or the defendant—the arrangement was exclusively between them—and at all times, down to the receipt and misapplication of the money, legally speaking, it continued under the control and direction of the former.

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He might have released, changed its destination, or made any other disposition of it at will.

Suppose he had subsequently directed an application in payment of some other debt and which had been made? Can it be doubted, but that the defendant by compliance with such direction would have discharged his trust? or if Hill had brought an action to recover the money could not Whitney have set off his demand?

In all the cases, the principle of which is sought to be applied, and on which the action must be maintained, if at all, the fund [*262] had been appropriated by an understanding between the debtor and creditor, assented to by the defendant; or by an express undertaking of the defendant with the creditor at the request of the debtor, or both.

In the case of *Neilson v. Blight*, 1 *Johns. Cas.* 205, the defendant not only accepted the property on condition of paying the plaintiff, but advised him to that effect. A promise was properly inferred to pay the money when received. In *Weston v. Barker*, 12 *Johns. R.* 276, the debtor gave the plaintiff an order on the defendant for the money when received, subject to which he had previously agreed to receive and hold it. In *Williams v. Everett and others*, 14 *East*, 582, it was determined where funds were remitted with instructions to pay the creditor, and of which he was advised, that if the banker refused so to apply them, this action could not be maintained against him; that the funds were still under the control of the remitter. See also *Hodgson v. Anderson*, 3 *Barn. & Cress.* 842. In *De Barnales v. Fuller*, 14 *East*, 588, n. the bill held by the defendants for collection belonged to the plaintiff, and of course they could not renounce the purpose for which the money was paid; they were the agents of the plaintiff, and could hold and apply it to no other purpose.

The case here is very much like *Yale and others v. Bell and others*, 3 *Barn. & Cress.* 683. There the plaintiffs held a bill of exchange accepted by I., payable at the house of the defendants. It was duly presented and payment refused for want of funds. The next day a bill was received from the acceptor with instructions to pay the plaintiffs' bill with the proceeds, who again presented it after the money was received by the defendants, and payment refused. They applied it on their own demands. The court say, unless some agreement had taken place respecting the bill between the defendants and the plaintiff, the former could only be considered as holding it for the use of I.

I agree such an undertaking may be implied, according to the case of *Weston v. Barker*, by an arrangement to that effect between the defendant and debtor, but in order to make the receipt of money in pursuance thereof in such case enure to the use of the creditor, he [*263] must have had notice of, and concurred in it, otherwise there is

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no privity express or implied between him and the defendant ; and this before the money is received, for he must be legally entitled to the money at the time of the receipt, not at the time of the action. 2 *Saund. Pl. and Ev.* 673. According to the case of *Williams v. Everett and others*, the true test is, to whom does the money belong at the time it is received by the defendant—to the debtor or to the creditor ? if to the former, the action will not lie. To hold that it belonged to the plaintiffs in this case would be saying, that the moment a debtor puts money into the hands of an agent to pay a debt, it passes entirely beyond his control, and vests absolutely, in the creditor, without his privity or assent. No such doctrine can be maintained. There must be some previous understanding with the creditor by the defendant, either directly, or through the agency of the debtor himself upon which to found a right to the fund, or an undertaking to pay.

Another insuperable objection, in my opinion, is taken to the recovery, namely : that the promise of the defendant, if it could be implied from the evidence in the case, enured to the benefit of the holder of the note at the date of the receipt of the money. The liability of the defendant then attached, if at all, according to all the cases ; the draft having been appropriated to pay the note, the money when received belonged to the holder, to whom the right of action immediately accrued. The money was received on the 7th October, and the plaintiffs did not take up the note till the 29th. The Phoenix Bank were the holders on the 7th, to whom the promise must have enured ; clearly they could have maintained the action if any one ; and then unless we concede negotiable qualities to this parol engagement, the plaintiffs must fail.

In every view I can take of the case, I think a new trial must be granted.

New trial granted.

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*HOPKINS vs. CABREY.

On a defendant, in a *justice's court*, making affidavit that the justice before whom the proceedings are had is a *material witness* for him, and that the facts he relies upon cannot be shown by any other witness, the suit must be discontinued. The justice cannot refuse to enter judgment of discontinuance on the ground that he *knows nothing material* between the parties, and has *no recollection* of the facts which the defendant affirms he expects to prove by him.

ERROR from the Dutchess C. P. Hopkins sued Cabrey in a justice's court on the 4th of May, 1838, for money had and received to the plaintiff's use, viz. the surplus money remaining in the defendant's hands as a school district collector, after retaining sufficient of the proceeds of a sale of the plaintiff's property to satisfy a school tax. After the plaintiff had declared,

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and before plea, in order to make out a case for judgment of *discontinuance*, the defendant made an affidavit that the justice before whom the suit was prosecuted was a material witness for his defence ; which being held insufficient, the defendant made a further affidavit, setting forth the facts which he expected to prove by the justice, *viz.* that before the commencement of this suit, the plaintiff sued the defendant before the said justice for the same identical property for which he now claims the surplus money ; and that judgment was passed on the same, and entered in favor of the defendant against the plaintiff for costs ; and also, that the plaintiff acknowledged in the presence of the justice, that the defendant had tendered to him the overplus money before the commencement of the former suit, and that he had no claim for surplus monies, and that the defendant did not know of any other person by whom he could prove those facts. Thereupon the justice ruled as follows : “ I am not satisfied that I am or can be a material witness in behalf of the defendant in this cause, for I know nothing material between the said parties, except what is contained in the *record* of the former trial between these parties before me, which this defendant can at all times avail himself of upon the trial of this cause ; and further, ‘I have no recollection of ever having heard the plaintiff admit [*265] that the defendant had tendered him the overplus money as mentioned in the affidavit.’ ”

The defendant then pleaded, and the justice rendered judgment for the plaintiff. The judgment was reversed by the common pleas upon certiorari, on the ground that the justice ought to have rendered judgment of discontinuance. The plaintiff brought error to this court.

S. Barculo, for the plaintiff in error.

C. W. Swift, for the defendant in error.

By the Court, COWEN, J. The affidavit was clearly sufficient within the statute. *Statutes of 1838, ch. 243, § 1, p. 232.* It may not have been so in respect to the former suit, but was as to the tender and admission. It is no answer that a *tender* was not pleaded. The omission may have been for the very reason that the testimony of the magistrate was gone.

Again : the justice had no right to interpose his private knowledge or recollection as an answer to the affidavit. Doing so would enable a justice to defeat the application, and at the same time to put the point beyond the reach of review, even on the facts which he may assume to know or to have forgotten. Here it is true he states them, but not under his oath as a witness. That the defendant has a right to require.

Again : his specification was not satisfactory. He had no right to as-

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sume that the docket and other written proceedings would have been proof as full to the purpose as if accompanied with his oath. Oral proof is often necessary to show what was in fact heard and submitted under an issue which has been tried, in order to give it the desired effect upon a subsequent trial of the same matter. His want of recollection might also have been remedied by a recurrence to circumstances in the course of his examination as a witness. I think the judgment of the common pleas should be affirmed.

Judgment affirmed.

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*FOLSOM and others *vs.* STREETER.

A vote of a school district meeting postponing the collection of a tax for the repair of a school house until the repairs are finished is a valid vote, and authorizes the collection of the tax. A warrant for the collection of a tax voted at a school district meeting may be issued by a majority of the trustees, who are also competent to renew the warrant; it is not necessary all of them should concur.

A warrant also may be renewed as often as the circumstances of the case require.

Whether an apportionment of the tax may legally be made by two of the trustees in the absence of the third, *quere*; the act of two, however, in making the apportionment will be held valid, unless it affirmatively appear that the third was not notified and did not attend.

A warrant for collection is valid in form, which directs the collection of the tax in case of non-payment, by distress and sale of goods in the same manner as is directed in warrants issued by the boards of supervisors for the collection of taxes.

A party assessed cannot object to the validity of a warrant under which his goods are sold, that after the delivery of the warrant to the collector the sum assessed to him is reduced in amount by one of the trustees of the district.

ERROR from the Essex C. P. Streeter sued J. Folsom, D. E. Sandford and H. H. Dennison, in an action of *trespass* for causing, as trustees of a school district in the town of Moriah, in the county of Essex, a pair of oxen belonging to the plaintiff to be sold at public vendue; which warrant the plaintiff alleged was issued illegally. In October, 1833, *Folsom* and two other persons, viz. *J. Reed* and *J. H. Wood* were elected trustees of school district No. one in the town of Moriah; and at the same meeting which elected the above trustees a vote was passed to raise \$100, to repair the district school house "to be collected when the repairs were done." In October, 1833, a tax list was prepared to raise the sum voted, in which the sum to be paid by *Streeter* was put down at \$36.90, and a warrant for the collection of the money made out. The tax list was prepared by *Folsom* and *Reed*, the other trustee, *Wood*, not being present, he having told his colleagues that he could not attend to it, that they must make it out, and he would consent to "what they should do in the premises. The warrant bore date on the 30th October, 1833, and was

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signed by only two trustees, viz. *Folsom* and *Reed*. The school house was not repaired until some time after the warrant was made out. In October, 1834, *Folsom* was re-elected a trustee, and *Sanford* and *Dennison* were elected his colleagues. In January, 1835, the warrant for the collection of the tax was renewed by *Folsom* and *Dennison*, the latter of whom removed from the state towards the close of the winter of 1835. It seems that previous to its renewal the warrant had not been delivered to the collector. On the 31st March, 1835, it was renewed a second time by *Folsom* and *Sanford*, and it was again renewed by them on the 9th July, 1835. After the warrant had been twice renewed, *Folsom* one of the trustees took it from the hands of the collector and reduced the sum to be paid by *Streeter* to \$35,90. In the month of July, 1835, the oxen of the plaintiff were sold by virtue of the warrant. It was proved that in 1824 school district No. one was divided, and a new district formed called No. four, within the bounds of which *Streeter* resided; but it also appeared that the district No. four was not duly organized, and that the proceeding creating it had been abandoned. There was an objection made to the proceedings of the trustees in making the apportionment, not necessary to be stated. There was also an objection taken on the trial to the form of the warrant of collection: it commanded the collector to collect from each of the inhabitants in district No. one, named in an annexed list the sum of money set opposite to his name, and in case of non-payment to levy the same by distress and sale of the goods and chattels of the delinquent in the same manner as in warrants issued by the boards of supervisors to the collectors of taxes. The court of C. P. held that the vote of the district school meeting postponing the collection of the tax until the repairs of the school house were made was void, and consequently did not authorize the issuing of the warrant for the collection of the tax. They also decided various other questions against the defendants, adverted to in the opinion delivered by the Chief Justice, to all of which the defendants excepted. The jury under [*268] the charge of the court found a verdict for the plaintiff with \$65 damages, on which judgment having been entered, the defendants sued out a writ of error.

E. Pearson, for the plaintiffs in error.

A. C. Hand, for the defendant in error.

By the Court, NELSON, Ch. J. It may be useful for the information of trustees of school districts to give the views of the court upon the several questions raised in this case, though all of them are not material to its decision. The system has become somewhat complicated, the duties of these

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officers often difficult, and involving considerable responsibility. Their conduct should always be viewed with indulgence, and is entitled to the most charitable intemments of the law.

1. The division of the district in 1824, by which the plaintiff was separated from No. 1, was never carried into effect by an organization of the new one (No. 4). It does not appear that any notice was given by the commissioners for that purpose according to the act, 1 R. S. 477, § 55; the old organization has continued down to the present time. The division was inchoate and never completed, and was practically abandoned.

2. The authority to vote a tax for repairs is express and unqualified, § 61, *sub. 5*, p. 478, and no time is specified in the act when or within which the money must be raised: it necessarily rests in the discretion of the meeting. It would have been wise, perhaps, to have limited the time by law. Whether an abuse can be otherwise reached, it is not important now to inquire. The moneys by the vote in question were not to be *collected* until the repairs were done, which in itself was unobjectionable—at least, so far as respected the tax payers. The delay, certainly, could do no harm to them, inasmuch as it does not appear that their rates were thereby increased.

By the 92d §, p. 483, the tax shall be assessed, and list made [*269] out by the trustees "within a month after the same is voted, so

that the persons voting the tax must pay it; it was so made out here. The time was sufficiently definite, to enable the trustees to make the collection within the spirit of the vote. They contract for and superintend the repairs, and must know best when the work is done. It was, doubtless, for this reason the time for collection was left open; and that to a vote in due form, an intimation was added to delay the collection till the money was wanted.

3. If the vote to raise the tax be in pursuance of the statute, then it follows there was sufficient foundation for the warrant in that respect.

4. Sec. 98, p. 484, provides that the warrant annexed to the tax rate shall be under the hands and seals of the trustees, or a *majority of them*. Here a majority signed, which satisfies the statute. By § 102, if the money shall not be paid by the persons named in the tax list, or collected within the time limited in the warrant, (thirty days after its delivery,) the trustees may renew it, &c. Trustees here mentioned, obviously refer to the same body authorized to issue the warrant, and the same number that can issue may renew it.

5. It is said the renewal was void, as no warrant had been previously issued. The renewal is in fact but a re-issuing of the process, and I perceive no reason against regarding it as an original issuing. Nor can the difference be material whether it lies in the hands of the trustees for a time, and is then revived by renewal, or in the hands of the collector unexecuted, which

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confessedly would justify it. There is no limitation in the act as to the number of renewals, and I do not perceive any objection to its being renewed oftener than once. Such was always the practice in respect to justices' executions, though I admit the language of that act is somewhat more explicit. The case of issuing a second *venire* in a justice's court is perhaps more analogous. It follows from the above views that the judgment must be reversed.

As to the other questions raised in the bill of exceptions: 1. The C. P. decided that the tax list was properly made **out*, [*270] which is said to be erroneous. The taxes are to be apportioned on all the taxable inhabitants within the district according to the valuation of their taxable property, § 86, p. 482, which is to be ascertained from the last assessment roll as far as practicable; beyond this, the trustees are to make a valuation from the best evidence in their power. § 90, p. 485. In *Easton v. Callender*, 11 Wendell, 90, we held that this duty of the trustees is in its nature *quasi judicial*, and that the trustees are not personally responsible for errors or mistakes in the discharge of it. For aught I can discover in the bill of exceptions, the ruling was correct on this point. Whether an apportionment of the tax by two of the trustees, in the absence of the other, is valid, may be a question. I will not now express a definite opinion upon it. If the third did not participate in the act, in order to bring up the point, in its broadest aspect, it should be shown, if the fact be so, that he was notified, and refused or neglected to attend.

2. The form of the warrant is well enough; and as to the mode of enforcing it, the collector is referred to the law respecting the duties of these officers under a warrant from the supervisors. There the steps required are specifically pointed out in the law. 1 R. S. 386, § 37; also p. 387, § 1, 2, 3, 4, and in connection, p. 478, § 98, 99, 100.

3. The proof in respect to an alteration of the tax list after renewal of the warrant is quite unintelligible. I am unable to comprehend the point, and shall therefore only say, that a reduction of *one dollar* in the plaintiff's tax cannot surely be a ground of complaint on his part.

Judgment reversed; *venire de novo* by Essex common pleas; costs to abide event.

**GAYLE vs. SUYDAM & BOYD.*

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Where the holder of a note payable at six months, agreed at the time of the taking thereof, to surrender the note, provided the maker before its maturity gave him a *satisfactory acceptance* at six months, and such acceptance was *tendered* and refused to be received by the agent of

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the holder, and was thereupon destroyed by the acceptor, who had personally made the tender, it was held, that by such destruction the holder of the note became entitled to elect whether to sue upon the note, or upon the acceptance, and that an action upon the note brought previous to the expiration of the second period of six months was maintainable.

ERROR from the superior court of the city of New-York. Suydam and Boyd sued Gayle on a promissory note made by him, bearing date 24th March, 1835, payable to the plaintiffs for \$1342,88, six months after date, at the United States Branch Bank, at Mobile. On the day the note was given, one of the payees entered into a written stipulation to give up the note to the maker provided he gave them before the note became due, a satisfactory acceptance on some responsible house in Mobile, to be approved by their agent there, at six months from 24th September, 1835, with interest added. The note was sent to the Branch Bank at Mobile for collection. On the 26th September, the note being in the Branch Bank at Mobile, B. Gayle tendered at the bank the acceptance of himself and partner, constituting the firm of *Gayle & Bower*, a mercantile house transacting business at Mobile, for the amount of the note with six months' interest added, in substitution of the note. The cashier refused to deliver up the note. Whereupon Gayle destroyed the acceptance. The house of *Gayle & Bower* were solvent and in good credit at the time of the tender, and continued so until the 22d March, 1837. The plaintiffs commenced this suit previous to the November term, 1835, of the superior court, and declared upon the note and the common money counts. The presiding judge charged the jury that the destruction of the acceptance restored to the plaintiffs their right [*272] to prosecute upon the note, and that the tender of the acceptance did not, under the circumstances, bar the plaintiffs' right of action. The jury found for the plaintiffs, and the defendant having excepted to the charge of the judge, sued out a writ of error.

H. B. Cowles & Willis Hall, (attorney general,) for the plaintiff in error, insisted that the tender of the acceptance was tantamount to a payment of the note ; or at least was an extension of the credit, and if an action upon the note was not barred, it was at all events prematurely brought ; that the destruction of the acceptance did not change the rights of the parties, and that there could be no recovery in the present form of action.

D. Lord, jun. for the defendants in error.

By the Court, COWEN, J. Taking both instruments together, the defendant below, in legal effect, contracted to pay \$1342,88, on the 27th September, with liberty to discharge the debt by procuring an acceptance at six months from 24th September, on such house at Mobile as should be approved by the agent there of the plaintiffs below. Either for want of instructions, or for some other cause, on the acceptance being tendered, the agent de-

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clined unqualifiedly to accept it. The tender was made by the defendant's agent, one of the acceptors, who, after the refusal, destroyed the acceptance. The defendant had a right to elect, under the contract, one of the two stipulated modes in which he would make the payment. He did so ; and thereby his obligation became single to pay by the acceptance. The tender, *prima facie*, cut off the right of the plaintiffs to sue either for not paying the money or furnishing the acceptance ; and to all this the court below agreed. They decided, however, that, by the destruction of the acceptance, the right to sue on the note was restored ; and whether they were right in this, is the only question in the cause.

Admitting that the destruction of the acceptance annulled the tender, I think there was no difficulty in the form of the "declaration" [*273] The contract was a promissory note defeasible by the substituted security. That not being furnished, the note was left to operate singly, and the pleader was right in declaring on that, or relying upon the general counts without setting forth the provision by which the defendant might come in and substitute the security for protracted payment. It was intended that a failure to defeat the note in the manner provided, should remit the plaintiffs to their remedy on the note, as an independent contract.

Then was there such a case appearing at the trial as left the note to its unqualified operation ? The tender was properly made in form so far as it went ; and had it been maintained in substance and effect, might have been insisted on as a bar. The note would have been discharged and must have been delivered up, and the plaintiffs put to their remedy on the acceptance, of which they might have obtained possession, or sued for its value, if the agent had refused to deliver it on demand, or perhaps they might have sued the acceptors on signifying their willingness to receive it, and offering the note even while the acceptance lay in the hands of the agent of the defendant. Indeed, according to the decided balance of authority, the property in the acceptance passed to the plaintiffs by the tender. 2 *Kent's Com.* 508, 3d edit. But the fatal misfortune to the defence was, that the acceptance was destroyed by the agent. This was a complete revocation or countermand of all that had been done by way of performance. It is said the tender was complete, that the agent had performed his office, and had no power to annul the performance ; that he had power only to complete it, as he did do. But the difficulty is to make out that he did so. You send an agent to tender an article of a sort which you stipulated to furnish ; its acceptance is declined at the moment, and your agent falling into a pet mutilates it. Yet you defend without even offering a substitute. I think your agent has not done his duty. You were bound to suppose that the article might at once be accepted, that it might therefore "remain for a while on your [*274] agent's hands, and be demanded of him after the tenderee should

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be more fully advised. Such things cannot always be done in a moment. And by an act of destruction or mutilation he undoes all that he had performed. He becomes a bailee for the tenderee it is true, and the latter may demand of him the subject of the tender, and if he withhold it, sue in trover or some other action ; and, if the thing be not destroyed or mutilated, perhaps this is his only remedy. *Lamb v. Lathrop*, 13 Wendell, 95. But if it be destroyed, or its value impaired by the act of the agent, because not accepted, as it was here, this is a wrong which the tenderee in his election may treat according to the apparent intent, which is to take back or annul all that has been done. The tenderor, whether the wrong be done by himself or agent, should not be received to gainsay such a construction. The tender must be not only formal but *bona fide*. The tenderor of a chattel need not, in pleading, say *uncore prist*, *Lamb v. Lathrop ut sup.*; but it must not appear in evidence that he has wilfully rendered the act unavailable. The obligation to keep the tender is not always imperious as it is where money was tendered. As to chattels, it is said that the debtor may abandon them. 3 Kent 509, ed. before cited. They may be ponderous, their custody troublesome or expensive, and in no case perhaps, where the tenderor retains them, can more than ordinary care in keeping them for the tenderee be demanded. The general rule was laid down in *Lamb v. Lathrop*. They are kept at the risk of the tenderee. In the case at bar, there was no more excuse for not keeping the bill, to be forth-coming on its being demanded by the plaintiffs below, than for not keeping specie or bank bills tendered and refused. And the destruction of the bill followed by this defence looks like an intent on the part of the defendant by his own wrong, to deprive the plaintiffs, not only of all remedy, on their note, but on the substituted security provided for by the parties. I do not deny that the plaintiffs below might have brought trover, or sued upon the acceptance, notwithstanding its destruction ; but I also think they had a right in their election to act upon the defendant's [*275] "conduct according to its plain language or import, which was a revocation or annulment of the tender. The judgment must be affirmed.

Judgment of the superior court of New-York affirmed.

STEVER vs. SORNBERGER.

It is no defence to an action of debt on a *recognizance of bail*, that the defendant is *not liable to arrest* on an execution on the judgment in the cause in which the bail was put in ; the remedy of the bail is to surrender the principal, if the latter does not apply for, and obtain an *orderstay*, to be entered on the bail piece.

Utica, July, 1840.—*Steever v. Sornberger.*

DEMURRER to pleas. The plaintiff declared in *debt* on a *recognizance of bail* entered into by the defendant, *Uriah Sornberger*, as the bail and manucaptor of *Ransom Sornberger*, in an action commenced against the latter by the plaintiff in this court, by *capias*, returnable in the term of October, 1836. The defendant *pleaded* that the suit of the plaintiff against *Ransom Sornberger*, was commenced for the recovery of money due to the plaintiff, for goods sold and delivered, and that the said *Ransom Sornberger*, for the period of one year previous to the commencement of the suit against him, had been and still was a *resident* and *inhabitant* of this state, to wit, at, &c., and that being such resident and inhabitant, he was not bound by the law of the land, to *render himself* to any of the prisons of the state, according to the form and effect of the *recognizance*, upon any execution, that was or could be issued on the judgment recovered by the plaintiff against him, nor could he be arrested by virtue of any execution which could be issued upon such judgment. There were two other pleas substantially like the above; to all of which the plaintiff demurred.

A. L. Jordan, for the plaintiff.

S. Stevens, for the defendant.

**By the Court, NELSON, Ch. J.* The bail is estopped from [*276] denying that his principal was liable to arrest—it is conceded by entering into the *recognizance*. 2 *Ld. Raym.* 1535. 8 *Wendell*, 481, 2. The privilege set up belongs to the principal alone; he may waive it if he pleases; and which we are bound here to assume he did do, otherwise he would have applied to the court, or a judge at chambers, for a discharge, instead of putting in bail. The idea of *duress* is absurd, as special bail do not come into the cause till after the return of the writ, and abundant opportunity to apply for the discharge.

The remedy of the bail, is a *surrender* according to the rules and practice of the court, or the principal might have procured an *exoneretur* without it, if he had moved in time. 9 *Wendell*, 462. 19 *id.* 122.

Judgment for plaintiff on demurrer, leave to amend on usual terms.

BURROWS *vs.* TURNER.

Where a ship is owned by two persons, in different proportions, and one of them agrees to procure her to be insured, and she is in fact insured, the policy expressing the insurance to be *on account of* _____ and the vessel is lost, and the loss paid to the party who procured the

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insurance, an action for *money had and received* lies against him, at the suit of the other party, to recover his *proportion* of the loss paid by the insurers. A policy of insurance *on account of* _____ is equivalent to a policy *for whom it may concern*, and in such case proof *aliunde*, may be given to show the real parties in interest, although it be a *patent ambiguity*.

ERROR from the superior court, of the city of New-York. Turner sued Burrows, to recover his proportion of moneys received by the latter, on a *policy of insurance* of a brig, called the *Burrows*, of which the plaintiff owned *one sixth*, and the defendant the residue. The negotiation for the purchase was conducted by *Charles Turner*, a son of the plaintiff, *John Turner*, from the tenth to the fifteenth of January, 1827. The object of the purchase was to procure employment for Charles, as master of the [*277] vessel. The vessel *was valued at \$8000, but in consequence of advances made to the crew, and buying off the claims of another person to go in the vessel as master, it was agreed that the plaintiff should pay the sum of \$1608, as the price of *one sixth* of the vessel. The plaintiff accordingly made and delivered his note for that sum, dated 15th January, 1827, and by writing, bearing the same date, the defendant *certified* that he had on that day, sold to the plaintiff one-sixth of the vessel, and by a bill of sale bearing date the *seventeenth* day of January, he regularly conveyed one-sixth of the vessel to the plaintiff. On the *nineteenth* day of January, the defendant presented to the *Niagara Insurance Company*, of New-York, an application for the insurance of the vessel, in these words: "Eight thousand dollars on brig *Burrows*, Turner master, valued at eight thousand dollars, to, at, and from New-York, and Carthagena—she is nearly loaded, and expects to sail Wednesday next, if ready—for, and at New-York to Carthagena and back, 2 3-4 per cent." And on the *same day*, the *Niagara Insurance Company* insured the vessel at \$8000, charging a premium of 2 3-4 per cent. The policy commences in these words, "By the *Niagara Insurance Company* of New-York. Silas E. Burrows, *on account of* _____ do make insurance, and cause to be insured, lost or "not lost, at, and from New-York to Carthagena, and at, and from thence "back to New-York, upon the body, tackle, apparel and other furniture of "the good Am. Brig, called the *Burrows*, whereof is master for the present "voyage—Turner, or whoever else shall go for master in the said vessel," &c. *Charles Turner* testified, that when he agreed to purchase, it was agreed between him and the defendant, *that the defendant should keep the vessel insured*, and after the sale had been effected, in a conversation relative to the vessel between the plaintiff and defendant, which took place on the *twenty-first* day of January, 1827, the plaintiff observed "well, Mr. Burrows, about the insurance," to which Burrows answered, "she is insured." The plaintiff asked "how much," the defendant answered "\$8000."

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The plaintiff asked if *that was enough*, and Burrows replied *yes*, *she is fully covered*. The vessel was lost, *and on the 19th July, [*278] 1827, the company paid the defendant \$8000. The plaintiff having rested, the counsel for the defendant moved for a *nonsuit*, on the grounds: 1. That by the true construction of the policy, the plaintiff's interest was not covered; 2. That *parol evidence* was inadmissible to contradict or vary the policy; and 3. That the evidence of an agreement to insure, would not entitle the plaintiff to recover as for *money had and received*; that the remedy, if any, was by an action on the agreement. The court refused to nonsuit the plaintiff, and after further testimony on the part of both the defendant and plaintiff, charged the jury if they found from the evidence, that the defendant at the time of the sale agreed with the plaintiff, to keep the vessel insured for the benefit of both, and did admit after the insurance, that he had insured for the benefit of both, that the plaintiff was entitled to recover one-sixth of the \$8000 recovered by the defendant. To this charge the defendant excepted. The jury found a verdict for the plaintiff, for the sum of \$2203.99. The trial was had on the 23d June, 1837. Judgment having been entered on the verdict, the defendant sued out a writ of error.

G. F. Talman, for the plaintiff in error.

J. Anthon, for the defendant in error.

By the Court, COWEN, J. The jury found that the defendant agreed with the plaintiff to insure the plaintiff's interest in one-sixth of the brig, and afterwards informed him that he had done so. The defendant owned five-sixths, and did the business by insuring the whole in his own name; and, on a total loss happening, he exhibited the preliminary proofs and obtained the whole valuation in his own name, and withholds from the plaintiff his share. There can be no doubt that, under such circumstances, the defendant was liable in this action for *money had and received* for the plaintiff's use.

It is said to have been held by this court, that the policy in this case was so constructed as not to be capable of covering "Turner's interest." That is not so. When the case was here, this court held that the policy did not do so, on its face; but it was conceded that, if the insurance had been in truth on joint account, and the policy had been general, on account of whom it might concern, the fact might have been shown by collateral proof, and the policy then have the effect intended by the joint owners. *Turner v. Burrows*, 5 Wendell, 541, 546. When the same case was before the court of errors, the chancellor thought the

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blank in this policy was equivalent to a general open declaration of interest, and might have been filled up according to the truth in an action on the policy. *8 Wendell*, 144, 150, 151. Indeed some of the court thought that, even as the case then stood, there was enough in it to have required this court, instead of directing a nonsuit, to put the question to the jury whether Burrows did not really insure both his own and Turner's interest. *Id.* 157, 158, 159. Yet the case then stood without the testimony of Charles Turner, which is directed to the agreement of Burrows to insure for Turner, and the declaration that he had insured; and the jury found his testimony to be true. It is the constant practice to show by proof *aliunde* the real owner, when the insurance is general for whom it may concern. The *blank* here is equivalent. In the language of Senator Westcott, *id.* 159, I think it might be shown who *this blank* is. And it was shown, as to one-sixth, to be Turner. The blank left an ambiguity to be filled up by extrinsic proof. It was *patent* if you please; but none the less explainable for that reason. *Fish v. Hubbard's Adm'rs*, 21 *Wendell*, 651, and the cases there cited. *Vide also per Parker, C. J. in Brown v. Gilman*, 13 *Mass. R.* 161, and *Porter, J. in Penniman v. Banemore*, 6 *Mart. Lou. R. N. S.* 497.

We think the decisions and charge of the court below were correct; and the judgment should therefore be affirmed.

Judgment affirmed.

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*CROSBY vs. HILLYER.

Where a *voluntary assignment* for the *benefit of creditors* was made by debtors, and the deed of assignment placed in the hand of the *assignee* who *hesitated to accept* for six hours, and then claimed the property, but before he concluded to accept, the property was levied upon by virtue of executions against the assignors, it was held, that the judgment creditors had obtained a *lien* upon the goods, and were entitled to have their debts satisfied in preference to the debts of the creditors provided for by the assignment.

ERROR from the superior court of the city of New-York. Crosby brought an action of *replevin* against Hillyer for a large quantity of merchandize levied upon by him as sheriff of the county of New-York, by virtue of two executions against John Hanna, Alpheus De Forrest and Henry O'Brien. The defendants in the executions had transacted business as merchants, under the name of *Hanna, De Forrest & Co.* The firm was dissolved in November, 1837. At the time of the dissolution, *O'Brien* transferred his interest in the partnership effects to *Hanna*, and committed to him and *De Forrest* the settlement of the partnership concerns. On the *twenty-second*

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day of December, 1837, Hanna and De Forest executed a voluntary assignment of all their property to the plaintiff, *Charles Crosby*, and to *Robert G. Hanna*, for the benefit of all their creditors, giving a preference to two creditors, viz. *Elisha Powel, jun.* and *John N. Selby*. On the day preceding the execution of the assignment, the plaintiff, Crosby, was solicited by *James De Forrest*, the father of one of the assignors, to accept an assignment to himself and a *Dr. Dodge*, and he consented to do so; and on the same day Crosby spoke to *E. Powell, jun.*, who was the book-keeper and chief clerk of the firm of Hanna, De Forest & Co., to obtain his services in case he became an assignee, to which Powell assented. The assignment was executed on the twenty-second day of December, 1837, at ten minutes before ten o'clock in the forenoon, to Crosby and Robert G. Hanna, instead of to Crosby and Dr. Dodge; neither of the assignees [*281] being present. The assignment was handed to *James De Forrest* for the purpose of being delivered to the plaintiff, and it was accordingly delivered by him to the plaintiff at ten o'clock A. M. of the same day. James De Forrest observed to him, we have not got the name connected with you in the assignment which was contemplated; to which the plaintiff answered that he must consider of it, that he was not satisfied with the individual with whom he was connected, and told De Forrest to call and he would give him an answer as to the acceptance of the assignment. At about one o'clock P. M. of the same day De Forrest called again upon the plaintiff, who said that he had not made up his mind whether he would accept or not, as he had not had time to inquire about Robert G. Hanna: he, however, retained the assignment in his possession. At seven minutes after ten o'clock A. M. of the twenty-second day of December, the executions under which the defendant justified were delivered to him, and at five minutes after eleven o'clock of the same day the property in question was levied upon, it then being in the store No. 66 Liberty-street, and the sheriff left an agent in charge of the goods. At four o'clock P. M. of the same day the plaintiff came to the store, claimed the goods as assignee, employed Powell, and put him in possession of the goods as far forth as he could under the circumstances. Powell and the agent of the sheriff retained a joint possession until the plaintiff sued out the writ of replevin in this cause, when the goods were delivered to the plaintiff, who has since remained in possession, acting as assignee under the assignment. On the twenty-third of December, 1837, *Robert G. Hanna*, by writing under seal, relinquished all interest in the assigned property to the plaintiff. The jury found a special verdict setting forth the above facts. They also found the value of the goods to be \$3000, and in case the court should give judgment for the defendant, they assessed his damages at \$3231,89. The court rendered judgment for the defendant for the sum assessed, together with the costs. Whereupon the plaintiff sued out a writ of error.

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[*282] **E. P. Hurlbut*, for the plaintiff in error, insisted that the deed of assignment was well executed as matter of fact, and that its actual execution by the assignors, and its delivery to a third person to convey to the assignee, *determined* or put an end to the title of the assignors in the property, 15 *Wendell*, 547 ; and the subsequent assent of the assignee perfected the title in him, although such assent was not fully expressed until after the levy under the executions. He took by *relation* from the delivery of the deed to *James De Forest*, *Viner's Abr. tit. Relation*, 290 ; 3 *Cowen*, 75 ; *Co. Litt.* 48, b. ; 2 *Ventr.* 198 ; and *Wilt v. Franklin*, 1 *Binn.* 502, a case directly in point, where the assent of the assignee was not given until two days after a levy under an execution. *See also 1 Show. Parl. Cas.* 150. Here the assent of the assignee previous to the levy should be presumed. He had been solicited to act as trustee, and had consented to do so ; he made arrangements with an agent to take charge of the property ; when the deed of assignment was delivered to him, he took it, and retained it in his possession until he concluded to act ; he did not refuse to accept the assignment, but only hesitated until he could make certain inquiries, and then, even before his co-trustee relinquished his interest, he asserted his title under the assignment. Not having notified the assignors of his dissent, he must be deemed to have accepted the trust. 2 *Ventr.* 198. 1 *R. S.* 731, § 142, 2d ed. 1 *Sumner*, 587. 2 *Kent's Comm.* 533, n. a. 3d ed. But if neither of the trustees accepted, the estate vested in both for the benefit of the *cestuis que trust*, and will be enforced in equity. 8 *Paige's R.* 420. 5 *id.* 46. 13 *Johns. R.* 314. 3 *Co. Litt.* 290, b, § 4. 11 *Wendell*, 248. 2 *Kent's Comm.* 533 n. a. 4 *Johns. Ch. R.* 529. 2 *Gallison*, 557. The assignment was made with the knowledge of *Crosby*, one of the assignees, and of *Powell*, one of the creditors. After the delivery of the deed of assignment to *Crosby*, the assignors could not have made a valid second assignment ; and if they could not have done so, the defendant is not protected by the executions. An actual delivery to the assignee was not necessary ; it was enough that the deed was placed in the hands of [*283] a third person to be delivered to him. 1 *Johns. Ch. R.* 240. 2 *Dyer*, 167, b. 12 *Johns. R.* 446. 1 *Salkeld*, 301. 3 *Co. 27, a.* It was not necessary the *assignee* should execute the assignment, 1 *Edward's Ch. R.* 261, nor that the *creditors* should expressly consent to the assignment. 4 *Johns. Ch. R.* 248. Under the revised statutes an assignment to trustees operates as a grant, and does not require any express consideration. 11 *Wendell*, 248. *See also 9 Serg. & Rawle*, 224 ; 2 *Conn. R.* 633.

J. Miller & D. Lord, jun., for the defendant, placed the defence upon

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two grounds : 1. That the assignment was fraudulent *in law*, it not being accompanied by an immediate delivery, and an actual and continued change of possession of the property assigned : relying upon 2 *Wendell*, 446 ; 17 *id.* 53, and 19 *id.* 181 ; and 2. That the assignment did not become a valid and effectual instrument in the hands of the plaintiff, so as to *vest* the property in him previous to the *levy* by the defendant. The defendant, or rather the *judgment creditors* are entitled to all the protection and advantage that a *bona fide* purchaser could claim at the time of the levy. There was no actual delivery at the time the assignors affixed their hands and seals to the instrument, nor was there a delivery when it was put into the hands of their agent to take to the plaintiff. The right of the assignors to dispose of the property did not *determine* or cease until *Crosby* actually consented to accept the assignment. If, after making inquiries as to his co-assignee, he had ultimately refused to accept the trust, the assignment would have been of no validity. 1 *Edwards' Ch. R.* 261. Whilst he kept it without consenting to accept the trust, it was a dead letter, and the assignors might have revoked it. Assent could not be presumed from silence, or from previous understanding between the parties, because he spoke and declined the trust for the reason that a person other than the one contemplated was associated with him. Until he did accept, the assignors might dispose of the property, and the assignment could not affect *judgment creditors* or prevent them from obtaining a lien by an actual levy. In a case like this, there can be no valid delivery *without acceptance*, "actual or presumed. 1 [*284] *Johns. Cas.* 116. 20 *Johns. R.* 184. 2 *Wendell*, 317. Until acceptance, the title was not in *Crosby* ; had he utterly refused, the assignment would have been a nullity. In whom, then, was the title ? Surely in no other than the assignors. The repeated applications to *Crosby* show that they did not intend the instrument should take effect unless he accepted the trust.

The authorities referred to by the counsel for the plaintiff establish the doctrine of *relation*, as between a grantor and grantee, or their representatives, but do not apply when the rights of third persons intervene. *Per Sutherland, J. in Jackson v. McMichael*, 3 *Cowen*, 75. See also *Frost v. Beekman*, 1 *Johns. Ch. R.* 297 ; *Viner's Abr. tit. Relation*, p. 288 ; 3 *Rep.* 29 a., and the case of *Jackson v. Rowland*, 6 *Wendell*, 666. The case in 15 *Wendell*, 547, the counsel said did not apply ; and what was said in 2 *Vent.* 198, they insisted was *obiter*. As to the case of *Wilt v. Franklin*, cited on the other side, they contended it was not law, and that even that case essentially differed from this, inasmuch as the assignee there *at once* accepted the trust, and by so doing concluded the assignor. As to the doctrine that the estate *vests* for the benefit of the *cestuis que trust*, where the trustees refused to accept, the counsel for the defendant contend-

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ed that it does not apply to the case of a *grant*, nor where the question of *delivery* of the deed is in doubt : but that it applies only to cases where the trusts are fixed by a complete delivery, and irrevocable, as in the cases of the creation of a trust by will, or of an acceptance and subsequent death or inability of the trustees to act.

By the Court, NELSON, Ch. J. Nothing is clearer than that the executions attached before the assignment of the goods to the plaintiff took effect. The goods were bound from the *delivery* of the writs to the sheriff, 2 R. S. 289, § 13, which was at *seven minutes past ten o'clock A. M.* down to *one o'clock P. M.*, the plaintiff had expressly refused to accept the trust. The mere taking into his hands the instrument and retaining it, amounted to nothing. There must be an acceptance of the trust—a delivery without acceptance, is nugatory. 12 Johns. R. 418. There can be [*285] "no presumption of acceptance from the time of the delivery here, as the declarations of the assignee negative the fact."

Indeed, here was an actual levy and custody of the goods before the execution and delivery of the assignment.

There is nothing in the transaction, that should induce us to make favorable intendments in support of the title of the assignee. The whole of it is the obvious contrivance of a failing firm to place their property beyond the reach of impending executions ; and that, too, without any previous communication with, or for aught that appears, knowledge of, their general creditors. It is an enterprize, exclusively of their own.

Judgment affirmed.

ANDREWS vs. PONTUE.

Where a party by a written instrument recited that he had taken a lease of a lot of ground of another in a certain street, and *agreed* on the opening of another street into the street in which the lot was situated, that he would pay his landlord \$100 as soon as such new street should be opened ; and it was proved that such writing was executed *contemporaneously* with the lease recited in it ; IT WAS HELD, that the execution of the lease was a sufficient consideration for the agreement, and that in an action on the agreement the landlord was entitled to recover. It seems also, that though the consideration had been *past* and *executed*, upon proof of the making of the lease, the jury would have been warranted to infer that it was executed *at the request* of the defendant ; and that even the word *agree* might import evidence of a consideration sufficient to support the agreement.

ERROR from the New-York C. P. Andrews sued Pontue in the court below, in assumpsit on the following instrument : " I, Paul Pontue, having leased from Samuel Andrews a certain piece of ground in Second street, between Avenue D. and C. ; and it being in contemplation to open Sheriff street, from

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Houston to Second street, I do hereby agree and bind myself to pay to the said Samuel Andrews the sum of one hundred dollars whenever and as soon as the said street shall be opened. New-York, May 7, 1835." The declaration recited the lease and set forth, as the "consideration of the [* 286] agreement, the opening of Sheriff street, averring that such opening would increase the value of the demised premises ; and that it had been opened. The declaration also contained the general counts. At the trial, the signing of the contract was admitted. The defendant's counsel moving for a nonsuit because the instrument was, on its face, a *nudum pactum*, the plaintiff proposed to prove a consideration by extrinsic evidence, which the court below decided he might do ; and he proved that the agreement was made contemporaneously with the lease, which with the contemplated rise in value from opening Sheriff street, was in fact the consideration for it. This was proved by one Valentine who said he drew the lease and agreement accordingly, and they were executed. The court said this did not vary the case from what it appeared to be by the agreement declared upon ; and that being without consideration, was void. They therefore nonsuited the plaintiff, who took an exception and brought error to this court.

D. Graham, jun., for plaintiff in error.

J. B. Scoles, for the defendant in error.

By the Court, COWEN, J. The plaintiff was nonsuited upon the abstract ground that the agreement in evidence was without consideration either appearing on its face, or made out by Valentine's evidence ; and not because there was any variance between the consideration as set forth in the declaration, and that relied upon at the trial. This relieves the case from any question upon the pleadings, and raises the single one, whether a sufficient consideration was made out at the trial or is inferable from the evidence.

First, it may be conceded that the naked circumstance of the plaintiff having some time before executed a lease to the defendant would not constitute a consideration legally available in support of the defendant's promise. Being completely past and executed, and not on the defendant's request, no obligation would therefore lie upon him to pay "the sum promised. [*287] Such is undoubtedly the rule, as to the form of pleading. There a promise averred to be in consideration of a past act, is not taken to be valid without the additional averment that the act was done on request, or some equivalent averment ; though I am not prepared to concede that, when we come to the evidence and have the recital of a past consideration before us, and an agreement apparently treating that as the consideration, a request may not be implied. Evidence that yesterday A. delivered to B. his horse, and that to

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day B. agreed to pay him \$100 in consideration of that delivery, would clearly authorize a jury to imply a request; and why not on a writing stating the same facts? Suppose it should run thus: A. having sold and delivered to me his horse, I promise to pay him \$100 on the opening of Sheriff street; who would hesitate, on that, to say that a sale on request, or such a sale as would constitute a valid consideration, was meant? We are too apt, on questions of this kind, to confound the doctrine of pleadings and evidence. In the former a request must always be alleged as parcel of a past consideration. On the evidence it is scarcely ever proved directly; but is left to be inferred. After Valentine had stated that the leasing and agreement were cotemporaneous, and that one was in fact the consideration of the other, it was very strong to say that no request could be implied. The distinction between pleading a request and proving one arises every day. It passes almost without notice in practice; and is not much regarded by the books. It is glanced at in 1 *Saund. Pl. and Ev.* 137, *Am. ed.* of 1829; and treated of a little more at large in 1 *Saund. R.* 264, note (1.) I cannot bring myself to doubt that an express averment of a request in this declaration would have been very well supported by the proof adduced at the trial. At any rate, I have no doubt the jury might have inferred that the recited lease was given at the defendant's request, after what Valentine swore to. Admitting that, on the face of the writing the matter stood ambiguously on the request, and whether it constituted the consideration for the promise, it was an ambiguity explainable [* 288] "within several of the cases cited in *Fish v. Hubbard's Adm'rs*, 21 *Wendell*, 651; indeed, within the principle of that case itself. No objection could be made to receiving parol evidence on the ground that the consideration was a demise of real estate; and so connecting with a promise parol evidence would be inadmissible by the statute of frauds, being executed, it might as well be connected in that way as the sale of a chattel. Even a deed in fee may be thus connected, in *assumpsit* for land sold. *Bowen v. Bell*, 20 *Johns. R.* 338. In the case cited the connection between the deed and the promise was shown entirely by parol evidence, which was also used even to contradict the clause in the deed which acknowledged the consideration money to have been paid. The rule in respect to all contracts is *ut res magis valeat quam pereat*. The diligence and astuteness which it is the duty of courts to exert in searching after a consideration and connecting it with a promise is illustrated by cases on guaranties. These must always be in writing; but the connection, and even the existence of the consideration, need not be directly and clearly expressed. Although the writing be obscure or ambiguous, the courts take it with its surrounding circumstances; and it is said, in figurative style, will *spell out* a consideration if possible. These cases have been so recently under our consideration and so much examined, that we need not go over them.

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What then is the case at bar on the written agreement and the parol evidence, if we are apt to rely specifically on the act of giving the lease as the consideration? The lease was taken with the defendant's assent, and he at the same time agreed to pay the \$100, which the witness threw into the form of the agreement declared on. Assent in dealing to receive an article sold or let is constantly received to evince such a request as will satisfy the averment in the declaration. In *pleading* you *aver* things exactly according to the legal effect: in evidence you often *infer* them.

But suppose the recital made nothing towards showing a consideration; suppose it a nullity and strike it out of the instrument, I am still of opinion that sufficient is left from "which to imply a consideration." [*289] The contract will then be, "I do hereby *agree* and bind myself to pay to Samuel Andrews the sum of one hundred dollars, whenever and as soon as Sheriff street shall be opened." Words like these, standing alone, were, in Easter term, 1839, held by the queen's bench, in England, to import a consideration, and were received as sufficient to sustain an action upon an account stated. *Davies v. Wilkinson*, 1 *Jurist*, Am. ed. by *Halst. & Voorh.* 372. The words were, "I *agree* to pay C. D. £695, at four instalments, (mentioning time and place for all except £95,) and adding, "The remaining £95 to go as a set off," &c. on a certain debt. The court pronounced this to be an *agreement*, not a promissory note; and held that the word *agree*, of itself, imported a consideration. Lord Denman, Ch. J. said, "I think the promise in this case conveyed by the words 'I agree to pay,' imports a consideration, without doing any violence to the language." And the three other learned judges, Littledale, Patteson and Coleridge, expressly concurred in the remark. The case is in point, and agrees with what has long been understood from the word *agreement*, as used in the statute of frauds. It means not only a promise but a *quid pro quo*, *Wain v. Warlters*, 5 *East*, 10. Lord Ellenborough, in the case cited, denied that the word was to be understood in a loose and incorrect sense, "as synonymous to *promise* or *undertaking*," but "in its more proper and correct sense, as signifying a mutual contract on consideration between two or more parties." In this view the court concurred. So much for the word when used in a statute; a *fortiori* when used in a contract. The statute might have been made operative without such a construction. In the view we are now taking, this contract cannot.

We have been favoured with the views of the learned judges in the court below, through a report of their opinions. They did not *agree* in sustaining this nonsuit. Two of them felt a difficulty in overcoming the ambiguity, the force of which I have noticed; but which, with deference, I have supposed not to be insurmountable. Neither of them adverted to the import of the word *agree*, when considered "*ex proprio vigore*. [*290]

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The third thought the promise might be sustained on an intendment arising upon the face of the instrument that some damage would arise to the plaintiff from opening Sheriff street, with which the promise might be connected. Were it necessary, I should think the case might well have been put to the jury in that third sense ; and it should rather have been maintained upon it than allowed to fail. The other learned judges admitted that it was a strong case for intendment in favor of some consideration ; but I think they felt themselves too much fettered by the exact words which they appear to have looked at in the light of the cases upon mere pleading. If tied up to them, and bound to go on the very words in the recital, they were clearly right. These words do literally import a past demise without telling us that it was on the defendant's *request*, and without directly treating it as a consideration, or clearly showing any consideration ; and the difficulty perhaps was not literally obviated by what Valentine said. Exactly following the recital in *pleading*, would have made a defective declaration. But when we come to *evidence*, the whole field of intendment and construction is opened. There, we may presume, more strongly than in support of a declaration, though after verdict. Yet then, in favor of a declaration, obscure words may be holden equivalent to the direct averment of a request. 1 *Saund. R.* 264, note (1,) before cited, puts the case I have supposed as a proper one from intendment after verdict. *Vide* the case cited by him: *Hayes v. Warren*, 2 *Str.* 933 ; 2 *Barnardist. K. B.* 55, 71, 140, *S. C.* In considering questions of this kind, we should constantly keep in view the precaution inculcated by my brother Nelson, in *Barber v. Wilson*, 12 *Wendell*, 102. In pleading an insolvent's discharge, you must always ever the jurisdictional facts, such as the *residence* of the debtor, the *petition* of two-thirds, &c. In the case cited, the court below, on the numerous cases to that effect in regard to *pleading*, required *direct proof* of jurisdiction, independently of the written discharge. This was holden erroneous. When

you come to the department of evidence, you go on wider ground.

[*291] Accordingly, Mr. Justice Nelson remarked, "the fallacy of the argument consists in blending the rules of evidence with the rules of pleading."

For one, I feel quite clear that the contract in question was sustainable on the evidence, in several paints of view. The judgment below must, therefore, be reversed, a *venire de novo* to go from the common pleas ; the costs to abide the event.

NELSON, Ch. J. and BRONSON, J. said, the lease and the agreement to pay \$100 being both executed at the same time, and as part of the same transaction, show a good consideration for the undertaking to pay \$100 on the opening of Sheriff street ; and the plaintiff was therefore improperly nonsuited.

Utica, July, 1840 — McCarty & Allison v. Hudsons.

McCARTY & ALLISON vs. HUDSONS.

Where a plaintiff in *replevin*, to an *avowry for rent*, pleads a *tortious traction* by the landlord, such plea is not sustained by proof that the landlord entered by virtue of *summary proceedings* under the landlord and tenant act for the non-payment of the rent.

Although such *entry* be found by a *special verdict*, the tenant is not entitled to judgment in an action of *replevin* brought for goods subsequently taken as a distress for rent, where he pleads a *tortious eviction*; to enable him to avail himself of such entry in bar of a distress for rent, he should *specially plead* the resort of the landlord to the other remedy. On the contrary, the landlord under such verdict is entitled to judgment *non obstante veredicto*.

A fact found by a *special verdict*, which would be a bar to a recovery, or defeat a defence if properly pleaded, will not be regarded by the court in rendering judgment; the court can look only at such facts as properly arise under the issues joined.

ERROR from the New-York C. P. The plaintiffs below, W. H. & R. E. Hudson, brought *replevin* against McCarty and Allison for taking certain goods and chattels. The defendants pleaded: 1. *Non-cepit*; and 2. Put in an *avowry* and *cognizance*, justifying the taking of the goods under a warrant of distress for \$278, a quarter's rent due 1st February, 1837, under a demise of certain premises from McCarty to the [*292] plaintiffs. The plaintiffs pleaded: 1. No rent in arrear; 2. That after the demise, to wit, on or about the 3d March, 1837, McCarty, *with force and arms*, &c., entered the demised premises and evicted the plaintiffs; and 3. That at the time of the making of the demise, *Robert E. Hudson*, one of the plaintiffs in this suit, was an *infant*, within the age of 21 years. The defendants replied, taking issue upon the plea of no rent in arrear; 2. They denied that *with force and arms* they entered the demised premises and evicted the plaintiffs; and 3. That before the commencement of this suit, to wit, on, &c. *Robert E. Hudson* attained the age of 21; and afterwards, to wit, on, &c. *ratified*, &c. To this last replication *Robert E. Hudson* rejoined, denying the *ratification* of the claim for rent. Upon the issues joined upon those pleadings, the parties went to trial, and the jury found a *special verdict* that the rent claimed by the defendants below was and is due and in arrear; that *Robert E. Hudson* did *ratify* the claim for rent in manner and form, &c. that on the 8th May, 1837, McCarty did, *with force and arms*, &c. enter in and upon the demised premises and evict the plaintiffs, under and in pursuance of *summary proceedings* had under the landlord and tenant act for the non-payment of rent due on the first day of November, 1836, and on the first day of February, 1837; and on the 29th May, 1837, took the goods in the declaration mentioned as a distress for rent, and if, &c. they find for the plaintiffs six cents damages and six cents costs. They also assessed the *value* of the goods at \$500. Upon this verdict the C. P. rendered judgment for the plaintiffs. The defendants sued out a writ of error.

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C. O'Connor, for the plaintiffs in error.

T. Phoenix & J. A. Morrill, for the defendants in error.

By the Court, NELSON, Ch. J. It is insisted by the counsel for the plaintiffs in error that the facts found by the special verdict do [*293] not support the issue, setting up a wrongful *eviction by the lessor, and that as all the other issues were expressly found for the defendants, judgment should have passed in their favor.

The plea undoubtedly sets up a tortious or wrongful entry and expulsion, and must be regarded in that light. It avers that the lessor, *with force and arms, &c.* entered in and upon the demised premises, and expelled and removed the lessees. In this respect it is in the usual form of pleas of this character. 2 *Chitty*, 486 and 633. 1 *Saund.* 204, n. 2. *Salmon v. Smith, Asht. Ent.* 411. 4 *Cowen*, 584. *Sutherland, J.* The fact also, if properly pleaded, constituted a perfect bar to the action, as the precedents of pleas above referred to show.

But the special verdict entirely fails to substantiate the plea. It shows a *lawful entry*, and possession by reason of the forfeiture of the lease, instead of an *unauthorized* forcible expulsion. The principle, therefore, upon which the defence was placed by the pleadings, totally failed.

The plea itself was defective, and should have been demurred to. The wrongful entry and eviction, to constitute a bar, must have taken place *before* the rent claimed, fell due. Such is the form of the precedents, and the averment is material. 1 *Saund.* 204, n. 2. *Comyns' Land. and Ten.* 524. 4 *Cowen*, 585.

It is, however, insisted that the facts contained in the special verdict constitute an answer to the avowry upon another ground: namely, that the removal of the tenants under the landlord's act, 2 *R. S.* 422, § 28, &c. for non-payment of rent due 1st February, operated as a *waiver of the remedy by distress*. Admitting this to be so, it is not the question presented upon the record, and that is a sufficient answer. The special verdict must be examined with reference to the issues which the jury are empanelled to try; and the question is not, whether the facts found *may* not constitute a ground of defence if properly before the court, but whether or not, upon the whole record, the particular defence set up has been established. To that we respond, in this case, that it has not been established; that the [*294] facts fail to maintain it in judgment of law. The plaintiffs should have pleaded, specially, the resort to the remedy which it is contended waives the right of distress.

Judgment reversed: *venire de novo* from the C. P.

Utica, July, 1840.—*Fellows v. Stevens.*

FELLOWS and others vs. STEVENS.

A creditor who has signified his assent to a composition between his debtor and the creditors at large of such debtor, cannot subsequently withdraw his assent without the consent of the debtor; but if such consent be given, the debtor cannot afterwards set up the agreement for a composition, in bar of an action for the recovery of the original demands.

Assent to a composition may be as well by surrendering debts and taking composition notes, as by signing and sealing a composition deed.

A composition as to simple contracts, may be by *parol*, but whether to affect debts due by *speciality*, it should not be under seal, *quere*.

As between a debtor and creditor, an *accord* to accept a less sum than the whole debt, is no bar, though satisfaction be tendered; but if the *accord* extend to *all* the creditors of the debtor, it is otherwise.

ERROR from the superior court of the city of New-York. The plaintiffs, Fellows, Read & Co. commenced an action of assumpsit against Stevens on five promissory notes, the last of which bore date on the 14th September, 1836, amounting, together with the interest thereof on the day of trial, to \$5020,18. The defendant pleaded non-assumpsit and payment, and on the trial of the cause produced in evidence a deed of assignment executed by him on 17th November, 1836, to *John Heath*, conveying to him his stock in trade as a jeweller, and other property, *for the benefit of all his creditors*, giving a preference to certain of them. On 5th December, 1836, the defendant made *proposals* in writing to his *business creditors* (in which he stated that he had *suspended* the execution of the assignment made by him to *Heath*) to settle with them as follows: on the surrender of their actual claims against him he would give to them respectively his notes at six, twelve and eighteen months from the date of the proposals, of equal amounts, *making together 75 cents on the dollar*. If the creditors preferred *to settle at once by receiving goods, he offered to give them 66 [*295] per cent.; in the proportion of 36 per cent. in precious stones, not set, at first cost, and 30 per cent. in jewelry at wholesale prices. The contract to be binding as soon as *creditors to the amount of two-thirds of the total of his business debts* would accept the proposals. A number of the defendant's creditors, whose debts amounted to upwards of \$26,000, and *among whom were the plaintiffs in this cause*, accepted the proposals by a writing endorsed on the same. In pursuance of these proposals a large number of the creditors of the defendant, and *amongst whom again were the plaintiffs in this case*, on the 16th December, 1836, executed an instrument under seal, consenting that *Heath* should *reassign* the property conveyed to him to the defendant, and releasing him from all liability under the assignment; and on the 29th December 1836, *Heath* accordingly by deed *reassigned* the property to the defendant. On the 26th December, 1836, the

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defendant signed a paper writing in these words : " It is understood by me that the signature " of *Fellows, Read & Co.* to the paper *releasing* John " Heath as assignee of my effects, shall be void, unless assented to after " this date." And in consequence of such writing, Fellows subsequently *obliterated* the name of his firm from the *consent* given to Heath to re-assign ; which obliteration was made after all the creditors, except two, had executed the instrument. On the 28th *December*, 1836, the plaintiffs offered to accept the note of a friend of the defendant at six months for the debt due to them, deducting 50 per cent. from the amount due. This proposition was not accepted, nor has any part of the debt due to the plaintiffs been paid, or compromised according to the *proposals* of the defendant. *Two-thirds* of the creditors in amount never signed the *acceptance* of the proposals, though nearly all of them, and at all events *more than two-thirds in amount*, executed the instrument consenting to the re-assignment by Heath, or settled with the defendant according to the terms of the proposals. The plaintiffs were the second in order who signed the consent that Heath should re-assign the property to the defendant. The evidence being closed, the plaintiffs [*296] claimed that they *were entitled to recover the whole amount* of the defendant's indebtedness to them, to wit, the sum of \$5020,18, and at all events that a verdict should be rendered in their favor for such sum as the two notes at *six and twelve* months, which were to have been given according to the proposals of the defendant of 5th December, 1836, would amount to ; which notes would have become due previous to the commencement of this suit, which was commenced on 16th May, 1838. The court decided that the plaintiffs *were not entitled to recover* the amount of the five notes, or any part thereof, and directed a *nonsuit* to be entered ; which was accordingly done. The plaintiffs sued out a writ of error.

B. W. Bonney, for the plaintiffs in error.

J. Anthon, for the defendant in error.

By the Court, COWEN, J. The matter upon which the defendant relied as constituting a bar, ran through considerable time and was made up of divers circumstances. Those which followed the proposals were, in the language of some of the witnesses, all based upon them ; and each must be regarded, in estimating their operation, as parts of a single transaction. That was intended to be a general composition with the creditors of the defendant by which he should be released from his debts. Several objections were made in the course of the trial to single pieces of testimony at the time of their being offered, such as the proposals, because all the names except those of the plaintiffs below were stricken out ; and the consent to Heath's re-as-

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signment, because the plaintiffs' names were obliterated. But the only true way in which to appreciate the defence is to look at the combined force of the facts, after the proposals had been followed out to an actual settlement with about all the business creditors except the plaintiffs. Beside the obliteration by consent, as a sign that the proposals had been consummated by actual settlement with those whose names were obliterated, formed no objection. And that was the object as finally proved. The [*297] reason for the plaintiffs' names being obliterated was also given in the course of the trial.

One difficulty now made is the want of a compliance with that clause of the proposals, which provided that they should be binding as soon as two-thirds of the total of business creditors would accept them. This was no doubt a condition precedent, without a compliance with which the defence goes for nothing. It is supposed, by the plaintiffs' counsel, that the condition could be fulfilled in no other way than by creditors to two-thirds in amount actually signing the written acceptance at the bottom. That was not done. The number and amount were a good deal enlarged by signatures to the paper, by which it was consented that Heath should reassign; and finally, either by signing some paper or actual acceptance of securities under the proposals, and generally by one or the other act, a clear amount of more than two-thirds acceded. I am inclined to think that this was sufficient to satisfy the condition. That was not expressed to be a written acceptance; nor is there any thing in the nature of these compositions requiring that all or perhaps any of the parts which go to make them up, should be in writing. Their effect as a discharge is based not so much upon the sort of instruments or other acts by which they are effected, as upon their being an agreement upon sufficient consideration among the several parties, the debtor on the one side, his creditors on the other, and the latter among themselves. They take up the matter and some of them incur a good deal of trouble and expense of time for the purpose of securing to themselves some part of a wasting wreck, to which is very commonly added the humane design of relieving an unfortunate debtor. Such at any rate is the frequent consequence; and that is sufficient to conciliate a favorable interpretation at the hands of the common law. There need not, that I can see, be a seal, or any other formal solemnity. To do the whole by parol would be exceedingly loose, and often unavailable for want of adequate proof; but where the debts reside in simple contract, I see no reason, if clearly proved, why an oral composition would not be equal to any other. [*298] The law, on finding a valid consideration, regards the act as a modification of, or substitution for, the various contracts on which the debts are due to the creditors; a cutting of them down, and renewal for good consideration in a qualified form. This is sometimes based upon a sim-

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ple meeting and resolution of the creditors. That was the form in *Boothby v. Sowden*, 3 *Campb.* 175, in which Lord Ellenborough adverted to the principle on which these compositions are sustainable. *Cranley v. Hillary*, 2 *Maule & Selw.* 120, was a case of resolutions. *Steinman v. Magnus*, 2 *Campb.* 124, 11 *East*, 190, S. C., related to an agreement unsealed, which was also holden valid. In *Bradley v. Gregory*, 2 *Campb.* 388, the agreement by which the plaintiff lost his remedy was by parol, and went mainly on other creditors being drawn in to execute a composition deed upon the faith that the plaintiff would join. *Vid. per Buller, J. in Heath v. Crookshanks*, 2 *T. R.* 27, 8; also *Turner v. Hoole, Dowl. & Ryl. N. P. Cas.* 27, 8, *per Abbott, C. J.* To affect debts due by specialty would perhaps require a seal, on the principle *eodem modo quo oritur, eodem modo dissolvitur*; but short of that, an oral agreement, on good consideration may modify or totally defeat a simple contract, accordingly as one or the other may appear to have been intended by the parties. *Allen v. Jaquish*, 21 *Wendell*, 680, 3. The additional creditors who signed the assent that Heath might re-assign, with the express view of carrying out the proposals, became, in substance, as much parties to the acceptance intended by the proposals, as if they had joined in signing the written acceptance at the foot of the paper itself. Each paper was but a part in the general machinery. Signing one, was a signing of the other; and the same effect may, I think, be predicated of those who, without signing either, came in, surrendered their original debts and took composition notes, with knowledge of the proposals and an intent to make themselves parties to the common arrangement.

The objection, therefore, that here was not a technical release [*299] by the plaintiffs, and no technical accord and satisfaction, "is wide of the case if either are to be taken as parties to the composition; and as accepting a satisfaction within the meaning of that term when applied to such a proceeding. This brings us to the question whether such a satisfaction is predicable of these plaintiffs. As between them and the defendant alone, there could be no satisfaction short of actual payment to the full extent of the debt, or the acceptance of a collateral thing. A mere accord is no bar, even though satisfaction be tendered. This was holden by *Heathcote v. Crookshanks*, 2 *T. R.* 24, even where all the creditors came in and were made parties pursuant to a general composition. There the composition money was actually tendered to the plaintiff; but even this was holden not to be sufficient, because it was not expressly pleaded that the plaintiff's agreement to accept it was in consideration of all the creditors coming in. Buller, J. admitted, that if the latter had been averred, the accord and tender might have been a bar. That I take to be settled by the subsequent cases, and to constitute the sole distinction between a private accord of the immediate parties, and one which is common to

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them and other creditors. In the latter case, a tender of satisfaction will do; in the former, there must be an actual acceptance. In the latter case, third parties have come in and taken their place by the side of the debtor; and both acting in good faith, and following up the terms of the composition to a tender, a legal bar may be raised short of the common abstract notion of a technical satisfaction. The whole seems to operate like a covenant not to sue. True, there is no estoppel as in that case, grounded on the desire of the law to prevent circuity of action; but rather an estoppel *in pais*, third persons being brought in to perform acts amounting to value, in consideration of the plaintiff's promise to accept the composition money or security as a total discharge. The cases have been already cited; and the remaining question is, whether the evidence in the court below brought these parties within the sphere of their influence.

The plaintiffs below began heartily and plainly. They signed both the written acceptance of the original proposals, "and the assent to Heath's reassignment. But they stopped before the actual reassignment could have been executed, at least with the intended effect; for it undoubtedly required the assent of all the defendant's creditors who had stood in the relation of *cestuis que trust* under the assignment. These had not all executed when the plaintiffs, becoming dissatisfied, struck their names from the consent to the reassignment, with the privity and virtual assent of the defendant; for he agreed in writing that they should not be considered bound by their signature. As it regarded himself, he might do that without seal; for the signatures to the reassignment were not yet all obtained; nor was the complement full when the names were actually expunged. Bonnefoux, who held the paper, was then actually in pursuit of signatures. Nothing was ever done after this by way of consummation, either on the side of the plaintiffs or defendant. The debt has not been paid, nor have the composition notes been given or tendered, nor any goods offered to the plaintiffs. In short, both they and the defendant discontinued all thoughts of going on to a discharge of this debt. Could the former have got hold of the original proposals, and the defendant had consented to such an act, they would doubtless have struck their names from them at the same stage of the proceeding. For aught I see, they had a right thus to withdraw, and refuse finally to discharge their large debt on the security offered for only part. To confirm their intention, they made an independent proposition to take certain specified security for fifty per cent. That was declined. On the whole, for reasons satisfactory to themselves, they did, about the time of Heath's re-assignment, manifest as distinct a determination to withdraw themselves from the arrangement, as they had originally shewn to engage in it. This they appear to have done openly, by the consent of the defendant."

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ant and in the face of the creditors. The design was actually communicated to Bonncfoux and Wheeler, the most efficient agents in prosecuting the business, and the former more deeply interested than any other. The names were struck out in his presence. It certainly did not appear [*301] that all the creditors or their agents were advised of this step on the part of the plaintiffs; nor was it necessary they should be. It was completely in the power of the defendant alone, either by positive concurrence or neglect, to follow up the arrangement, to remit the plaintiffs to their original remedy for the whole debt, if indeed the remedy can be said ever to have been suspended.

The cases to which I have before adverted will, I think, be found to contain the enumeration of every possible principle on which the creditor's obligations of forbearance based on these composition arrangements can be said to rest. In sketching what I consider the result of the cases, I have not extenuated those obligations. Looking at them as between the debtor and creditor, they would, as we have seen, depend on nothing but an accord, which, till executed, binds not. Relatively to creditors, the agreement is binding *per se*, provided it be followed up; and the law will insist on its execution in good faith, setting aside all secret terms made by the creditor with the debtor, more favorable to the former than is allowed to the other creditors; and this on the principle of maintaining integrity towards them and humanity to the debtor. *Abbott C. J. in Turner v. Hoole, ut supra. Alsager v. Spalding, 4 Bing. N. C. 407.*

But I have met with no case which denies to the creditor an open withdrawal of his name, with the consent of the debtor, as was practiced here. In saying this, the court labors under the disadvantage of being left to their own unassisted means of research; for not a solitary case or book was cited by either of the learned counsel on the argument. This was wrong, for no doubt the subject is much more familiar in the place of their residence, and where these parties reside, and where the cause was tried, than in any other part of the state. I can only say, I have bestowed on the question what attention and research my time has allowed. After all, the debtor is the man most interested in seeing that the arrangement be carried out. Both he and any one of the creditors have, I think, room at any stage of its progress, for an honest open retraction, such as they mutually stipulated for here, and

[*302] mutually executed by their positive acts. There is no fraud to redress. Independently of that, "in all the cases I have seen where the creditor was holden to have been bound, he has arbitrarily refused to go on, without the consent of the debtor, after his conduct might be deemed to have drawn in other creditors to execute a deed of composition, and all was arranged, and strict performance finally tendered to him according to the terms which he had proposed. The strongest case is

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Bradley v. Gregory, 2 *Campb.* 383, and there the creditor had been zealous and active in causing all the other creditors to sign the deed. He had drawn them in to a course of action by which their rights were affected as well as those of the insolvent, and drew back on the tender being made. Such conduct always works an estoppel *in pais*. Lord Ellenborough held there was in effect, satisfaction as well as accord. In *Steinman v. Magnus*, *id.* 124, 11 *East*, 390, *S. C.*, the composition money had been actually paid. All the cases hold that if the terms of the composition agreement be not exactly followed out by at least a tender of the substituted securities at the very day, the creditor is remitted to his remedy for the whole original debt. True, in *Boothby v. Sowden*, 3 *Campb.* 174, Lord Ellenborough, Ch. J. held it lay with the plaintiff to show an infraction; but afterwards, in *Cranley v. Hillary*, 2 *Maule & Selw.* 120, the whole court, headed by the same learned chief justice, repudiated that rule, as a general one, saying it was most probably laid down on peculiar circumstances. This has been followed by *Oughton v. Trotter*, 2 *Nev. & Man.* 71; and see *Ward v. Bird*, 5 *Carr. & Payne*, 229. There is no difference in principle between these latter cases and *Boothby v. Sowden*. That went on the *onus probandi*, which clearly, according to all analogy, should lie on the debtor. He is seeking to discharge a larger claim by substituting security for a smaller one in pursuance of a condition precedent which he has stipulated to perform. It was said, in argument, that these plaintiffs could not recover an amount even to the extent of the security proposed to be substituted, because it was, according to the terms of the proposals, to be given only *on* the creditors surrendering their debts. This is taking pretty high ground for an insolvent debtor, claiming the favor of "being let off on securing only a part. Still it is not deniable, perhaps, that creditors may, by the terms of the composition, take the burthen of such a condition on their own shoulders; nor is it necessary, in my opinion, for the plaintiffs to deny here that they did do so originally. The fatal answer is, that so far as lay in the defendant's power, he positively discharged them from all obligation, by a writing executed, and never afterwards made any attempt to renew the obligation. That, we have already in part seen, need not have been under seal, though the plaintiffs had signed and sealed a consent to Heath's re-assignment. That assignment was yet *in fieri*; and completed afterwards. Such a technical question, perhaps, need not be considered; for, after what passed between both parties, no one could suppose that steps would be taken by the plaintiffs or the defendant towards completing the proposals as between themselves. But the basis of the whole was not sealed. The assent to Heath's re-assignment referred to the proposals which were not sealed, and the proposals to that; both were a part of the same general measure, and a mutual agreement to rescind the one, equally affected both, and all

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other parts of the machinery. The names of the plaintiffs were, in effect, as completely gone from the proposals as from the instrument with which they were connected. One must necessarily stand or fall with the other; and neither had any existence as between the plaintiffs and defendant, after the names of the plaintiffs were withdrawn, and were not even thought to have existence by either party. So much for the defendant's rights, which were nothing. As before remarked, he had complete power to annihilate whatever rights he had acquired under the proposals, without the consent of the creditors. In the ordinary case we have seen, that his mere neglect, his withholding a tender of the substituted security for one day beyond the time fixed in the condition, remits the creditor; *a fortiori*, where the neglect is agreed upon, and both parties join in releasing each other. This defence can be maintained only on the rights of the *creditors*; as to the *defendant*, there is neither accord no satisfaction. And it were surely a novel head of defence, *to say that a party shall be protected from the payment of an honest debt whether he will or no. His claim to exemption was, in my opinion, personal to himself throughout. He might waive it, and I think did do so most effectually. On the whole, giving his case the most favorable construction, it came entirely short of a defence, either total or partial.

It follows that the court below erred in awarding a nonsuit. The judgment must be reversed, and a *venire de novo* go from that court; the costs to abide the event.

HECKSCHER and others *vs.* McCREA.

Where a party contracts to load a ship to a given amount of tons, at a stipulated price per ton, and falls short in shipping the *whole number* of tons, the owner or master of the vessel is entitled to recover, in the nature of *damages*, freight for the deficiency; but where in such case goods are offered by a third person, to be shipped to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at the current prices, the owner or master of the vessel is bound to receive such goods, and place to the credit of the original charterer the net earnings of such substituted cargo, after making all reasonable deductions resulting from the circumstances of the case.

ERROR from the superior court of the city of New-York. On the 14th April, 1833, a contract in the nature of a charter party was entered into between McCrea, the plaintiff in the court below, and two mercantile firms of the city of New York, viz: C. A. & E. Heckscher, and Low, Wilson & Co., the defendants in the court below, whereby McCrea engaged to despatch the ship *Mary*, from *New-York* to *Canton*, and back to *New-York*,

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with liberty to touch and trade at *Manilla*, and to ship in the vessel from Canton or Manilla, merchandize consigned to the two firms, to the amount of \$22,500, upon the gross sales of which, they should be entitled to a commission of five per cent, including a guaranty. In consideration whereof, the two firms engaged to ship on board the *Mary*, at Canton or Manilla, merchandize to the amount of 330 tons measurement, upon which they would pay a *freight* of \$32 per ton, measurement of 40 cubic feet, 60 days from the arrival of the vessel in New-York. The [*305] ship to remain in Canton 90 days, for the purpose of unloading and loading. The *Mary* arrived at *Whampoa*, (the usual place for loading and discharging cargoes at *Canton*,) on 27th January, 1834. Merchandize belonging to the Messrs. Heckscher to the amount of 200 tons, was shipped on board the *Mary* for her return voyage, but as to the remaining 130 tons, their agents declined to furnish the merchandize, except 5 tons, though called upon to do so by the agents of McCrea. After much correspondence on the subject, the agents of the Messrs. Heckscher, at Canton, on the 21st April, addressed a note to the agents there, of McCrea, inquiring whether they were willing to have the residue of Messrs. Heckscher's tonnage in the *Mary* *filled*, and the freight *specified* in the bill of lading, at \$20 per ton, with the understanding that the rate of freight proposed by them should not interfere with the arrangement made between the parties at home. This offer was declined by the agents of McCrea, on the ground that they were not authorized to receive goods on any terms, other than at the rate of \$32 per ton. The *Mary* left Canton on 28th April, on her return home, having received on board only *five tons* of silk, as a portion of the 130 tons, there being ample room for the remainder. At the time of the *offer*, thus to fill up the quantity of 130 tons, at a freight of \$20 per ton, the agents had no goods on hand belonging to the Messrs. Heckscher or to the other firm, but they had upwards of 200 tons of tea under their control, which they were authorized by the owners thereof, to ship to the United States, at the *current rate of freight*, which was then \$20 per ton, and which was shipped by other vessels at that rate of freight. Upon this state of facts, McCrea brought an action of *assumpsit* against the other parties to the contract, claiming to recover the amount of *deficient freight*. The judge instructed the jury, that the captain of the ship was not bound to take on board at Canton, goods belonging to persons *other* than the Messrs. Heckscher, and to sign bills of lading therefor at a less rate of freight than that stipulated for in the agreement; and if he was so bound, still that the letter of the agents of the 21st April, did not in judgment of law amount to such an [*306] offer or tender of freight, as imposed on the captain the obligation to take such goods on board. The defendants excepted to the charge, and the jury found a verdict for the plaintiff, for \$5,200, on which judgment was entered. The defendants sued out a writ of error.

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F. B. Cutting & J. Anthon, for the plaintiffs in error, insisted that the agents of the plaintiffs below were bound to have received the cargo proposed to be substituted upon the terms offered, as by so doing, \$20 out of every \$32 of the tons deficient would have been saved, and no possible injury would have accrued to their principal, as his rights under the original contract were expressly proposed to be reserved. They cited *Abbott on Ship.* pt. 3, ch. 1, § 3, and ch. 7, § 2; *Holt on Ship.* 322, 475; 13 *East.*, 566; 10 *id.* 379; 1 *Taunt.* 300; 5 *Maule & Selw.* 180; 4 *Barn. & Ald.* 50; 18 *Johns. R.* 157; 2 *Sumner*, 589; 6 *Pick.* 248; 4 *Cowen*, 478; 8 *Cranch*, 49; 3 *Campb.* 202; 6 *Bingham*, 190.

J. Prescott Hall & D. Lord, Jun., for the defendant in error, insisted that the letter of the agents of the defendants under date of the 21st April, 1834, was not an *offer* of any merchandize, nor *notice* of any being ready for shipment; it was a proposal for a *new agreement* on behalf of new parties. It was not an offer of merchandize for shipment *on behalf of the defendants*, and was not binding, because accompanied with a condition variant from the contract. And at all events the master was not bound to accept the proposal. They cited *Lawes on Ship.* 344, 118, 122, 316; 2 *Taunt.* 285; 2 *Sumner*, 589, 600; *Cro. Eliz.* 172; 2 *Saund.* 837; 3 *Johns. R.* 342; *Abbott on Ship.* pt. 3, ch. 1, § 19.

By the Court, Cowen, J. This is an action for dead freight, which the plaintiff below claimed to have earned under a special contract. The plaintiff agreed to allow a space of 330 tons measurement in the ship *Mary*, on her return voyage from China to New-York; the defendants on [*307] their part *to fill so much of the ship and pay \$32 per ton. The ship lay at Canton for the term stipulated, in the course of which time she received cargo from various shippers; and, among others, the defendants filled up 200 out of their 330 tons. As to the residue, which all parties relied would be filled by *Low, Wilson & Co.*, there was a failure, if we except the trifling amount of silk furnished by *Russel & Co.*, who it is agreed were the sole agents of the former at Canton, and were looked to by all concerned as the only persons who were expected to fill the 130 tons. This was as well known to *Blight & Co.*, the plaintiff's agents, and to the master of the *Mary*, as to any other person. All the defendants resided in the city of New-York, and to them the ship was to be consigned. A good deal of intercourse by way of notes or letters and otherwise passed between *Blight & Co.*, who had the charge of the plaintiff's business at Canton in respect to the cargo of the *Mary*, and *Russel & Co.*; and by the 21st of April, about a week before the time fixed for her departure, all prospect having failed that *Low, Wilson & Co.* would be able to perform, *Russell &*

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Co. proposed, on their own account, to fill the space at \$20 per ton, bills of lading to be signed accordingly, under a stipulation that the transaction should not interfere with the original contract. This was declined, on the sole ground of Blight & Co. having no authority to consent that the bills should stand at less than \$32. In consequence of this refusal, in which the master participated, the Mary came home, for so much, an empty ship ; and the defendants below have been subjected in damages to nearly two thirds more than if the plaintiff's agents had thought themselves warranted in taking the goods at the freight proposed. No want of good faith is perhaps, imputable to any one concerned. The failure of Low, Wilson & Co. to supply the goods, doubtless arose from accident ; and the refusal to receive the goods proposed as a substitute, seems to have turned on a scruple of the master, who supposed that his signing bills of lading at \$20 would annul the stipulation for \$32 contained in the freight contract.

It may be conceded that if the offer of goods by Russell & Co. had proposed them *in fulfillment of the stipulation* in "the con- [*308] tract, it would have been the duty of the plaintiff's agent to refuse them on such terms. A tender of payment or performance must always be unqualified ; and in the case of cargo tendered under a charter party, this is in general especially important, because, by signing bills for less than the stipulated freight, though it may not affect the owner's personal remedy against the merchant, the master may lose his lien for the balance. The owner is entitled not only to the security of the charter party ; but to the additional right of lien for the whole freight which grows out of the nature of the contract. It was upon this ground that Lord Ellenborough proceeded in the case of *Hyde v. Willis*, 3 Campb. 202. The defendant stipulated by his charter party to furnish a full cargo of sugar, and pay freight at the rate of 10*s.* 6*d.* per cwt. ; but on the ship arriving at Jamaica, his agent tendered the sugar, insisting that bills of lading should be signed at 10*s.* That was held to be a defective tender ; that the master might treat it as a refusal to perform ; might regard the contract as broken, and recover for dead freight. Lord Ellenborough did not say, however, that the bill of lading being signed in the terms proposed would discharge the defendant from his personal stipulation to pay 10*s.* 6*d.* ; and clearly it would not have any such effect. He said the master must deliver the goods, on payment of the freight mentioned in the bill of lading. This must have been, because it so provided by its own terms ; but such delivery would be in no way incompatible with a remedy by action for the agreed amount of freight in the charter party. The right of lien is merely to secure what is due for the labor of the ship ; it is for the benefit of the master or owner, and may, like any other security, be waived by the party to be benefitted, without impairing his right to a remedy by action. *Abbott on Ship.* 280, 281, *et seq.* *Am. ed.*

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of 1829, and the cases there cited. It is entirely clear, therefore, that even if goods should be accepted and bills of lading signed at a rate inferior to that fixed by the charter party, it could in no way affect this beyond the right of lien arising from it. In the case at bar, it is quite doubtful [*309] whether the stipulation as to the time of payment did not waive that right; it postpones the time 60 days after the arrival of the goods in New-York—a term which was probably altogether beyond a reasonable one for their discharge and delivery. If that were so, the lien was waived according to all the cases. *Chase v. James*, 5 *Maule & Selw.* 180. *Crawshay v. Homfray*, 4 *Barn. & Ald.* 50. *Chandler v. Belden*, 18 *Johns. R.* 157. *Certain logs of mahogany*, 2 *Sumn.* 589.

But I forbear to pursue the inquiry as to the rights and obligations of these parties in their course towards a compliance with the contract. I agree that the owner and his agents might insist on its exact terms, at least the substance of them, being followed. The question, I think, is not alone whether Blight & Co. or the master were bound to take the goods offered by Russell and Co in *performance*. All idea of performance had by this time been abandoned by both sides. It was completely ascertained that Low, Wilson & Co. could not fill the 130 tons, and the ship was not even bound to remain till the lay days had expired with any view to performance. *Blight v. Page*, 3 *Bos. & Pull.* 295, note. *Abbott on Ship.* 428, Am. ed. of 1829. And if there were nothing more in the case, the master might have immediately weighed anchor and sailed for home. The defendant's contract might be considered as, *pro tanto*, already broken and the master absolved from the duty of all further stay.

The more grave question is, however, whether, under such a concourse of circumstances, the master did not owe another duty to the defendants which he has unwarrantably refused to discharge. By failing to perform, and that promptly, I admit the defendants had already subjected themselves to an action for damages. That they do not deny; but it by no means follows that where a man has hired out the services of his person or his property at a stipulated price, and the employer has failed to perform, the employee may, either by lying still, or omitting to engage otherwise in the general line of his business, as a matter of course subject his employer to a payment of the whole contract price. We lately had occasion to consider this [*310] rule as applied to canal freight in *Shannon v. Comstock*, 21 **Wendell*, 457. And I will only repeat as to the general ground, the remark of Mellen, Ch. J., in a case there cited: "If the party entitled to the benefit of the contract can protect himself from a loss arising from a breach, at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so regardless of the increased amount of damages for which he may intend to hold the other contracting party liable." A doc-

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trine so sound in morals, I never could have suspected to be wanting in any department of the law, till I heard it denied as to maritime contracts by the candid and able counsel who argued for these defendants in error. Even they admitted that the case at first struck the court below, much as we told them it did us upon the argument; and I cannot suppose that the decision we are called to review must have finally turned upon a course of technical reasoning, perhaps an application of positive authorities which I have not been able to regard as at all controlling the question. On the contrary, I have looked into the rule of damages for breach of charter parties as laid down by Abbott on Shipping and other books; and so far as I have been able to discover, especially in those which treat of the English rule, they accord with the general one laid down by the Ch. J. of Maine. When the merchant is not ready to lade on board, the master is at liberty, and may recover damages. *Molloy* B. 2, ch. 4, § 3. *Jamieson v. Laurie*, *Abb. on Ship.* 185, Am. ed. of 1829; 6 *Bro. P. C.* 474, *Toml. ed. S. C. Thompson v. Inglis*, 3 *Campb.* 428. *Kleine v. Catara*, 2 *Gallis.* 61, 74, 5. That is to say, in effect, the vessel becomes a general ship, and the master may contract with another. And this is said by *Molloy*, even though part of the lading be put on board. Abbott says, he ought not to take in other goods, if the ship be freighted by the agent, without the merchant's consent, unless he be insolvent, in which case the master may take other goods to secure his freight. This distinction rests on the ground that the responsible merchant, upon whom the loss is to fall, may take it upon himself and order the ship to sail. *Abbott on Ship.* 178, ed. before cited. It may be admitted as a general rule that, in a case of the "breach supposed, the master or [*311] owner shall be entitled to recover as damages freight for the entire deficiency. *Duffie v. Hays*, 15 *Johns. R.* 327. *Thomas v. Clarke*, 2 *Stark. R.* 450. *Abb. on Ship.* 277, 8, ed. before cited, § 2, and the cases there cited. The question is, however, under what circumstances the merchant may demand that his case be made an exception. One clearly is where the master has in fact taken other goods and made a profit. In such case, unless there be something specially against it in the charter party, the profit is received and allowed by way of recoupment. This is so plain as to be assumed in the last edition of *Abbott* which I have seen. The book says the remedy for the breach of a general covenant to load the ship is an action for damages, in estimating which a deduction is to be made for such benefit, if any, as the master might derive from bringing the goods of other persons. *Abb. on Ship.* pt. 3, ch. 1, § 13, b, p. 199. ed. of 1829. The case of *Bell v. Puller*, 2 *Taunt.* 285, was cited on the argument of the case at bar to prove the contrary; but the place now cited from *Abbott* is a commentary on that case, and distinguishes it from a general covenant to

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load. In that case, there was a special stipulation, that, on failure to load the ship, the charterer should pay a particular sum, and the ship be at liberty to return. That was held to release the claim to recoupment of what the ship had earned after the failure. The case goes to confirm the general rule. Indeed, on a like special clause coming in question a short time before, in the king's bench, it was not thought to take the case out of the general rule, *Puller v. Staniforth*, 11 East, 232; though that court afterwards agreed with the decision in the common pleas. *Puller v. Halliday*, 12 id. 494. So, says Abbott, section last cited, p. 200, there is a rule in the French ordinance, importing that "the merchant who does not load the goods mentioned in the charter party, shall nevertheless pay the freight as if the whole had been laden." Yet he adds, at the commentary both of *Valin* and *Pothier*, on this rule, that, if the master procure goods from other persons, the freight that he derives of them shall go in diminution of the sum to be paid by the merchant; *for the ordinance awards the whole to him only by way of indemnity. All this is said of a hiring of the whole ship by the merchant, which I take to be a stronger case against him than a partial hiring, or contract to supply only a part of the cargo. The rule, therefore, applies more clearly in the latter case; the authorities are more numerous, more direct and speak with less caution as to the course of the master in taking freight from third persons. The remarks in Abbott, edition before cited, 199 to 201, apply to the breach of a covenant, both for a general and partial loading. At page 277, the book lays down the rule thus: "And where again he has covenanted to furnish a complete lading, or a specific number of casks or bales, and failed to do so, he must make good the loss which the owners have sustained by the failure, to be settled in case of disagreement, by a jury, who will take all the circumstances into their consideration, and make due allowance to the merchant, for the profit which the master may have made by bringing the good of other persons, if any have been brought." This rule was distinctly asserted by Story, J. on a stipulation for part of a cargo, in *Kleine v. Cattara*, 2 Gallis. 61, 66, and I cannot find that it has ever been doubted, where the charter party does not itself fix a different rule of damages. This is sometimes done, as I before noticed; and where the covenant is partial, a French ordinance allows the withdrawal of the goods by the merchant on paying a moiety of the freight. Abbott, 200, ed. before cited. A special clause may be seen in *Robertson v. Bethune*, 3 Johns. R. 342. There it was that, if the charterer failed to furnish a certain portion for a return cargo, he should pay \$1,300 for the freight of the outward cargo. Such ordinances and stipulations all imply, what the books assert, that the damages may by no means come up to the freight agreed. The government in

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one case and the parties in the other, seek to liquidate them by positive provision. A recovery is, in the latter case, had under the notion of stipulated damages. In the case at bar, there was no such stipulation; there was no statute; and there can be no doubt that had the master taken the freight offered by Russell & Co. it would, in legal effect, "have" [*313] saved to the defendants twenty dollars out of thirty-two dollars of each ton remaining unoccupied.

But the master chose to decline taking it. We have so far examined his right only. Having the power to rescue the shippers from more than one half the damages arising from their misfortune, (for no fraud is pretended,) was it his duty to do it? It appears to me that Lord Tenterden answers this question directly, in *Abbott on Ship.* 428, ed. before cited, pt. 3, ch. 11, § 2. He is speaking particularly of a merchant hiring a ship to go to a foreign port, and covenanting to furnish a lading there, but his performance being prevented by a prohibition of the foreign government against exportation. After citing cases to show that his obligation is not thereby dissolved, as it would be by a prohibition of the merchant's own government, the book adds: "But in such case, or if the default be owing to the personal neglect or inability of the freighter, and not to any general cause, the master on his arrival at the port of lading, should obtain another cargo, if possible, from other persons, and not sullenly hoist sail and depart, in order to charge the merchant with the whole freight. And if, upon the ship's arrival, he is informed that the merchant is unable to furnish the lading, he cannot, by waiting the time appointed in the charter party, charge the merchant with the demurrage." It is scarcely necessary to add that the learned writer thus puts the very case at bar, and applies the very principle cited from the opinion of Mellen, Ch. J. and which we applied as the rule of damages for violating an agreement to furnish freight for a canal boat, in *Shannon v. Comstock.* The same rule in substance was asserted in an earlier edition by Lord Tenterden himself. *Vide Am. ed.* of 1822. Both the books were edited here by Mr. Justice Story, who seems judicially to approve of the rule in question by what he said of it in *Kleine v. Catara,* 2 *Gallis.* 75. The case of *Blight v. Page,* 3 *Bos. & Pul.* 295, note, is relied on in both editions; and that branch of the decision which denies all allowance to the master for demurrage does contain a principle sufficient to warrant the rule in the full extent to which it is laid down by the last edition of Abbott. It *shows not only that the master has a [*314] duty to perform, but that if he do not perform it, and on the contrary, so conduct without necessity, and on full notice, as to enhance the mischief under a belief that the freighter must bear all the loss, he cannot recover in respect to damages thus incurred, thus drawn upon himself by his own voluntary unnecessary act. In the language of Lord Kenyon, there would be *no pretence for damages.*

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True, the master must be governed according to circumstances. In case of a China ship, her lay-days nearly out, with a valuable cargo already on board, bound on one of the longest voyages in the world, I agree there was little or no chance to search out goods for the 130 tons. A short inquiry for them was all that could be exacted. But the goods were laid in his way. Freight was low; and he could not expect the \$32 per ton. Russell & Co. offered at the same rate which they afterwards paid to another ship. No two men can differ on what sound morals required of the owner and master. The only excuse in this respect, was the fear entertained of dissolving the original contract. But the duty was more than one of mere imperfect obligation. The master would have been legally bound to take the goods whether offered by Russell & Co. or a stranger. I understand the offer as being made of their own goods. The refusal was the more unaccountable inasmuch as Russell & Co. offered to do all in their power to obviate the scruple which was started. Some little latitude in so serious a matter should be accorded to the foreign agent. There was nothing in the contract requiring the shipment to be of the defendant's own goods. They therefore had a right to underlet their share in the ship, at the contract price, or at a still higher rate. *Michenson v. Begbie*, 6 Bing. 183. And why not for a lower rate, without prejudice to the owner's original claim? In the case cited, the sub-contract was compared to an underletting by a lessee. What difference to the landlord, if his rent be secure, whether his tenant get more or less than the original rent? The case at bar comes very near in principle to that in *Bingham*, which is reported more at large in 3 [*315] *Moore & Payne*, 442. But independently of that, take the rule of Lord Tenterden, that the master should obtain another cargo *if possible*, and it is clear the verdict below was too large by more than half. Much was said in argument of the inconvenience to which masters will be subjected, by thus making their ship a general one. Among others, the loss of lien secured by the charter party was repeatedly mentioned; and I have admitted all the force that objection can claim. It is confined to an offer of performance. If it have any force, it must lie there. The question of indemnity, is entirely another matter. The proposed bill of lading might provide for a lien *pro tanto*. Surely that would not be diminishing the security. It was safer for all concerned. Goods subjected to a lien for only a portion of the original freight were better than an empty ship. Their receipt on still more unfavorable terms might, under the circumstances, have been an object with both owner and freighter. Suppose there had been a total failure of all contract cargo; was the ship to return empty because freight had fallen in the market? The right of lien if there were any, remained as to all the goods on board upon the 21st of April;

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and an acceptance of the offer would probably have enlarged it. At all events, it would have added to the security for that portion of the freight covered by the contract of the defendants. Then, it is said, thus making the ship general and forcing goods on the master, would make him a common carrier and collector for as many persons as the freighter may choose to let in under his contract. That again is supposing the freighter to make the offer in the name and right of his contract. In what manner he might under-let would be one question; and if any very serious prejudice were like to ensue to the general interests of the voyage, or the ship, that might be an argument against taking the substituted goods in any view. Here, the agents and master would not stop to inquire how that matter was under the offer of Russell & Co. They at once took the ground of no authority to receive goods under the most convenient arrangement. Beside, if, in order to mitigate damages, the goods are received upon a new contract onerous and expensive *beyond the terms of the original [*316] charter party, that would take from the amount to be deducted.

The rule of assessing damages, as laid down for such a case by the last edition of *Abbott*, pt. 3, ch. 1, § 13 b, p. 199, *Am. ed.* of 1829, is thus: "In estimating the damages, the jury would make a deduction for such benefit, if any, as the master might derive from bringing the goods of other persons, but if he should have been obliged to return empty, they would award damages equivalent to the sum that would have been payable by the merchant for a full cargo: taking care on the one hand that the master should lose nothing, and on the other hand that he should gain nothing by the breach of the merchant's contract.

The objection as to the form of the offer from Russell & Co. is answered by the nature of the master's duty. That was to seek for freight and obtain it if possible. Of course he was bound to make the suggestion that it could be had, coming from persons respectable as Russell & Co. appear to have been, the foundation for inquiry and final acceptance of such freight as it might lead to, if that could be obtained on reasonable terms. He was bound to meet any offer more than half way.

I think, on the whole, that the plaintiffs in error have reason to complain of the rule of damages adopted by the court below; and, for that cause, the judgment should be reversed; a *venire de novo* to go from that court, the costs to abide the event.

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Where a party is bound to give *oyer* of a deed, he must furnish not only a true copy of

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the instrument itself, but of all endorsements and memoranda upon it and of all papers attached to it, so that his adversary may have the same view of the matter as if the deed had been brought into court.

A stranger to a deed is not bound to give oyer; the rule applies only to parties or privies, and even privies in estate cannot be required to give oyer unless they come in *conventionally*. If they become privies by the acts of others, or mere *operation of law*, they are not bound to give oyer.

[*317] *DEMURRER to plea. The plaintiff (Jeremiah Van Renssaler) declared in covenant for rent due on a lease in fee, reserving rent executed by one *John Van Rensselaer*, an ancestor of the plaintiff, to one *Andries Muller*, on the 20th November, 1759. The plaintiff averred that the demised premises came by assignment to the defendant, and that since the accruing of the estate of the plaintiff, the sum of \$2000 rent had become due and was in arrear. He set out his own estate, by averring that after the execution of the lease, to wit, on the 25th May, 1782, the lessor made his last will and testament, and devised all his interest in the demised premises and in the rents reserved by the lease to trustees, for and during the life of his grandson, *John Van Rensselaer*, in trust, to permit his grandson to receive the rents and profits during his life; and from and after the decease of his grandson, he devised all his interest in the premises and rents to the *first son* of the body of his grandson, and to the heirs male of the body of such first son lawfully issuing; and for default of such issue, then to the second, third and every other son of his grandson successively, and in remainder the one after the other in seniority, and to the several and respective *heirs male* of the bodies of such first and other sons; that the lessor died in 1783; that *John I. Van Rensselaer*, the grandson, had a first born son who died intestate and without ever having had issue, in the life-time of his father, to wit, in 1813; that he, the plaintiff in this cause, was the *second born son* of *John I. Van Rensselaer*, who departed this life on the 26th September, 1828; whereupon he, the plaintiff, became entitled to demand and receive the rents, &c.

The defendant *pleaded*, that *John Van Rensselaer*, the *testator*, at the time of the making of his will, was seized of a large tract of land called the *Claverac estate*, including the demised premises; that after his death, to wit, on the 29th December, 1783, *John I. Van Rensselaer* entered and became seized in his demesne as of freehold of the said estate; and on 4th November, 1794, entered into an *executory contract* for the sale and conveyance of such estate to one *Daniel Penfield*, and subsequently by lease and

[*318] release, bearing date the 31st December, 1794, and 1st January, 1795, granted and conveyed the *Claverac estate*, including the demised premises and the rents thereon reserved to *Penfield*, who by a certain *indenture* executed by him, bearing date 15th October, 1806, (with cer-

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tain schedules thereto annexed and therein referred to, containing a list of divers farms and parcels of land in the said indenture mentioned, together with divers deeds of indenture, reserving certain annual rents thereon executed therefor, by Hendrick Van Rensselaer and John Van Rensselaer, ancestors of John I. Van Rensselaer, and also by the said John I. Van Rensselaer and Daniel Penfield, and of the rents so reserved; and which said farms and parcels of land, and the deeds of indenture reserving annual rents as aforesaid, and the rents therein and thereby reserved, *are in no way connected with or parcel of the premises, deed of indenture or rents in the several counts of the plaintiff's declaration mentioned; and which above mentioned indenture, sealed with the seal of the said Daniel Penfield, together with so much and all such parts of said schedule thereto annexed and therein referred to as aforesaid, as contain a description of the lands, premises, deed of indenture or rents in the said several counts of the said declaration mentioned or any part thereof, or as refer to the same or any part thereof or as are in anywise connected with or parcel of the same or any part thereof, the said defendant now brings here fully and freely into court, the date whereof is the day and year last aforesaid,*) granted and conveyed the Claverac estate (including the demised premises, and the rents thereon reserved) to John Watts, who, by his last will and testament, bearing date 30th May, 1836, devised the *same estate*, including the demised premises and rents in question to *trustees* for the benefit of his grandson. The defendant further averred, that John I. Van Rensselaer had a *first born son* named John Van Rensselaer, who was born 1st May, 1791, after the passage of the act of the legislature of this state to *abolish entails*; that such *first born son*, before and at the time of his death, having acquired an estate in *tail male*, was, under and by virtue of the statute in such case made and provided, **vested with and entitled to an absolute right [*319] and interest in fee simple, in expectancy, in and to the rents in question;* that such *first born son* died without lawful issue on the 1st August, 1813, leaving his father him surviving, to whom the rents in question *descended*, and in whom they vested as *heir at law* to his said first born son; and upon such descent of the remainder in fee simple of the rents, *the same endured* to the benefit of, and passed, and was attached to the estate conveyed by John I. Van Rensselaer to *Daniel Penfield*, and by the latter to *John Watts*, so that the trustees under the will of John Watts now are seized of and entitled to a full absolute estate, right and interest in *fee simple* in and to the rents reserved out of the premises in the several counts of the plaintiff's declaration mentioned, subject only to the trusts created by the last mentioned will. The plea then concluded with a verification and prayer of judgment.

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To this plea the plaintiff *demurred*, stating for cause : that the defendant should have made a *profert* of the deed executed by *Penfield*, together with *all the schedules thereto annexed* and therein referred to, and not of so much only and such parts of the schedules as, in the opinion of the defendant or his counsel, contain a description of the lands, premises, deed of indenture or rents in the several counts of the declaration mentioned.

J. Blunt, for the plaintiff.

A. L. Jordan & G. Wood, for the defendant.

By the Court, COWEN, J. It is perfectly well settled that on oyer demanded, the party making *profert* must furnish a copy of the whole deed, including the attestation clause, witnesses, memoranda written at the bottom, and the like. In short, the act of furnishing a copy should be made, as nearly as possible, equivalent to the ancient practice, which was to bring the deed itself into court, where it continued a whole term for the party demanding oyer to inspect it as much as he pleased. *Shep. Touch.* 73.

[*320] *Longmore v. Rogers*, Willes, 288; *Barnes*, 283, S. C.; **nom. Longman v. Rogers*. *Comyn's Dig. Plead.* (P. 1.) This is highly reasonable ; for a deed may be much varied or qualified, indeed its meaning entirely changed by papers endorsed, written below or annexed to it. The party in *pleading* it is never required to set out the whole deed, but only such parts as tend to make out his case, and these not literally, but only according to their legal effect. Allowing him to judge what portions that remain are material for his adversary to see, would subject the latter to the decision of a very partial judge. The *profert* must be commensurate with the obligation ; and it follows that it should have been general in this plea, including the schedules which make part of the deed, provided the defendant was bound to give oyer at all.

Whether the defendant was under obligation to give oyer in this case is the more material question. If he was not, his making *profert* will not raise an obligation. A stranger to a deed is not bound to give oyer ; it is only a party or privy to the deed or to some estate or interest, affected by it, or one coming in and claiming in right of another who is a party or privy, who must do so, *Shep. Touch.* 73. Indeed the obligation can hardly be said to rest in all cases on mere privity. It seems rather to depend on the question whether the party pleading has come in *conventionally* as a privy, thus having it in his power to obtain the deed itself, or at least to provide for having the use of it whenever it may be necessary in an action or defence. It is not necessary to go over the cases. They are all collected in the later editions of *Comyn's Digest*. See *Pleader*, (O. 8,) and (O. 9.) A series of cases are there cited which are entirely conclusive against the demurrsers in ques-

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tion. The deed from *Penfield* raised a privity of estate between the grantee Watts, and the defendant, which was continued between the defendant and the trustees under Watts' will; but this was by *operation of law*. The defendant held no control over *Van Rensselaer*, the devisee, or *Penfield*, the purchaser. The estate held by each in the rent charged on the defendant's land was transferrable at their pleasure, and would raise the relation of landlord and tenant between them and the defendant for [*321] the time being; and that relation has finally been transferred to the trustees under the will of Watts. But it is impossible for the defendant to obtain the deeds of transfer or even a copy, without the consent of those who may have a right to them. The deed in question belongs to the trustees under Watts' will, who may entirely withhold it from the defendant. There is no authority, at least no modern authority, and none that has not been overruled, which would require this defendant to give oyer under such circumstances. On the contrary, several cases are cited by *Comyn* where persons who come in as privies by operation of law have been excused from giving oyer of the deeds under which they claimed: among them are guardians, tenants by statute merchant, staple or elegit, or in dower, and several stronger cases; though it is said a tenant by the courtesy pleading the deed of his wife must give oyer of that, though he is in by act of law; for he shall be presumed to have it in his power. These instances are sufficient to illustrate the distinction; and at the same time to show the clear and strong reason on which it stands. See also *Viner's Ab. Faits* (M. a. 14,) and (M. a. 15,) and *C. Litt.* 225, a. and 225, b. A deed lost by accident may be pleaded even by a party to it, without profert. *Read v. Brookman*, 3 T. R. 151. The principle of that case lets in the like mode of pleading whenever it appears that the deed is beyond the party's reach. There must be judgment for the defendant on the demurrers, with leave for the plaintiff to withdraw them, and reply on the usual terms.

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A broker's memorandum is good, although no name be *subscribed* to it; the substitution of the word *subscribed* in the revised statutes for the word *signed* used in the old statute, does not change the law. It is enough that the names of the parties intended to be bound appear in the body of the memorandum.

Where a sale is made through the intervention of a broker and in his memorandum terms of sale advantageous to the purchaser are omitted, it does not lie with the vendor to object to the memorandum in an action against him for the non-delivery of the property.

The rule of damages for the non-delivery of chattels sold is the market price on the day ap-

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pointed for delivery less the contract price where the latter is not paid; it is of no consequence at what price the purchaser had agreed to sell to others.

ERROR from the superior court of the city of New-York. Shields brought an action of *assumpsit* for the non-delivery of a quantity of iron. On the 21st January, 1836, a *broker* employed by the defendants sold to the plaintiff fifty tons of English iron at \$70 per ton, at a credit of six months, the iron to be in *good order* and the plaintiff not to be bound to take it unless it arrived in *reasonable time*. The invoice and bill of lading dated on the 10th October, 1835, were received by the defendants on the 4th December. The iron was shipped on board the brig *Anna*, which arrived between the 15th and 25th April, 1836. On 27th April, the plaintiff tendered \$3500 in bank bills and demanded the iron, when the defendants refused to deliver. No objection was made to the tender being in bank bills. The broker made a memorandum of the contract of sale in his book of sales in these words: "Jan. 21st. Sold this day to George W. Shields on ac. of Davis & Brooks, fifty tons of English bar iron—say 25 tons $1\frac{1}{2}$ by $\frac{1}{2}$ —25 tons $1\frac{1}{2}$ by $\frac{1}{2}$ —50 tons at \$70, to arrive on board brig *Anna*; said iron to be in good order or no sale." The broker communicated the sale to the defendants, but no sale note was delivered to either of the parties. The defendants proved that the usual passages of ships carrying iron varied from 30 to 70 days; that 170

days was a long passage, and that they considered the vessel lost.

[*323] That *before* the sale to the plaintiff, and on the same day, they sold 50 tons of the iron expected by the *Anna*, to Messrs. Piersons & Co. of the same sizes with that sold to the plaintiff; that the iron which came in the *Anna* consisted of 30 or 40 different sizes, and that the sizes sold to Piersons & Co. and to the plaintiff, fell short; that the 50 tons sold to Piersons & Co. were duly delivered. The broker did not inform the plaintiff of the *previous* sale to Piersons & Co. The defendants also attempted to prove that the iron was not in *good order*, i. e. that it was *rusty*, but a member of the firm of *Piersons & Co.* testified that though it was somewhat damaged, in the spring of 1836 any thing was merchantable, and that the iron in question was merchantable; but in ordinary times he would not have considered it so. The defendant sold several portions of the iron at \$98 per ton, and amongst others they sold 8 or 10 tons at that price to an individual who had on the second day of *March*, purchased of the plaintiff that quantity at \$80 per ton, if the iron arrived safe. The evidence being closed, the counsel for the defendants insisted: 1. That the memorandum of the broker was not a sufficient note of the contract, within the statute, 2 R. S. 130, § 3, because it did not contain the agreement as to the *time of payment*, nor the condition of arrival in *reasonable time*; and that it was not *subscribed*; 2. That the contract was *mutually conditional*; not op-

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tional with the plaintiff and binding on the defendants; and 3. That the following contingencies defeated the contract: 1st, the iron did not arrive *in reasonable time*, which imported a reference to ordinary voyages, and professed to limit the period of exposure to a fluctuating market, and that double the time of the longest voyage is not reasonable time in contemplation of the contract; and 2d, the 50 tons sold to the plaintiff were the balance of a specific 100 tons *after* the sale to *Piersons*, and as the *whole quantity* did not arrive, the purchaser was not bound to accept a *part*. 3. That the plaintiff at all events was only entitled to recover, in reference to the price at which he contracted to sell, viz. \$20 per ton. The chief justice charged the jury that if they should find that the iron was in good "order at the time of its arrival, then the plaintiff was entitled to a verdict; that the broker's memorandum was sufficient; that the time when the iron arrived was, in judgment of law, reasonable time; that although the whole of the 100 tons of iron of the description of the 50 tons sold to *Piersons & Co.* and to the plaintiff, did not arrive, the contract was not, under the circumstances of the case thereby defeated, nor the defendants discharged therefrom; and that the plaintiff was entitled to recover damages at and after the rate at which the defendants contracted to sell the iron to the plaintiff, comparing with the rate at which the defendants sold it to others. The defendants' counsel excepted to the charge, and the jury found a verdict for the plaintiff, with \$1516, 81, on which judgment being entered, the defendants sued out a writ of error.

D. Lord, jun. for the plaintiffs in error.

J. Taylor & D. Selden, for the defendant in error.

By the Court, COWEN, J. The two classes of objections collateral to the memorandum of the contract in question admit, I think, of short answers. The first objection is, that the broker departed from his authority, in omitting to state the *time of credit* and the *condition of arrival* within a reasonable time; in other words, that the contract stood in his book as a cash sale, and imported an obligation to receive at whatever time the ship might chance to arrive, though delayed beyond a *reasonable time*. That in this he exceeded the authority conferred on him by the plaintiff below, may I think, be conceded without the least prejudice to his claim. The terms omitted were restrictions which he imposed upon the broker for his own benefit, and were no doubt in fact more favorable to him than those actually inserted in the memorandum. To this, however, it did not lie with the defendants to object; nor do they appear to have done so in fact. The plaintiff certainly had the

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[*825] right to object ; but he chose to adopt an act upon the entry of his agent as true, although this resulted in the harder terms "of immediate payment, and unreasonable delay. The rule in such case is *omnis ratihabitio retrotrahitur et mandato equiparatur*. *Long on Sales*, 402, *Rand's ed.* 1839. This rule extends as well to an authority for executing a contract in conformity to the statute of frauds, as to any other ; and if the contract relate to the sale of goods or any other act required to be in writing by title 2, in 2 R. S. 70, 2d ed. the authority need not be in writing, whether it arise from original delegation, or subsequent adoption. *Per Jackson, J. in Lent v. Padelford*, 10 Mass. R. 230, 236. The propriety of applying the maxim *omnis ratihabitio, &c.*, to such cases, was very fully considered by the C. B. in the late case of *Maclean v. Dunn*, 1 *Moore & Payne*, 761, 766, and conceded in this very case of a broker's memorandum. 4 *Bing.* 722, *S. C.*, more briefly reported. Best, Ch. J. cited two previous cases to the same effect, *Kinnitz v. Surry*, *Paley's Pr. & Ag.* 143, n. ; and *Soames v. Spencer*, 1 *Dowl. & Ryl.* 22. They are to the exact point ; and the surprise is, after what Best, C. J. said in *Moore & Payne*, and *Bingham*, that the question should ever have been raised. In regard to the assent of Davis & Brooks, beside its being palpably unnecessary in respect to the terms of the contract which made in their favor, still, if that were not so, their subsequent assent should, *prima facie*, be presumed. *Vid. 1 Phil. Ev. Notes by Cowen & Hill*, pp. 301, 308. The conditions, as the broker swore, were communicated to them, and we hear of no dissent by them on account of a supposed departure from authority in making the contract most favorable to their side. But even if they had actually dissented on such ground, who ever heard of such an objection being allowed ? I tell an agent to sell my horse on *credit*, and he brings me *gold*, who ever thought I could object that he had exceeded his authority ? The more favorable term is always implied by law in the very act of employing an agent. 1 *Liv. on Ag.* 97. The term of arrival in reasonable time was obviously a mere proviso or condition on the side of the vendee, with which the vendors had nothing to do, by way of objection on their part.

[*826] "The objections, that the iron did not, in fact, arrive in reasonable time, and that it did not answer the sizes mentioned in the memorandum, are much of the same character with those in respect to the want of authority. These objections assume that the contract was correctly drawn up, but insist that a certain condition and stipulation in favor of the plaintiff has not been complied with. As to the condition, the rule is that the party in whose favor it is intended to operate may waive it. *Cranfield v. Crane*, 5 *Cowen*, 270, and several cases in the notes, *id.* 271 to 278. *Per Putnam, J. in Hunt v. Livermore*, 5 *Pick.* 397, 398. *Poth. on Obl.* No. 47, 48. 1 *Ev. Poth.* 28, *Lond. ed.* of 1806, *Maline v. Freeman*, 4

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Bing. N. Cas. 395. *Doe, ex dem. Bryan, v. Bancks,* 4 *Barn. & Ald.* 401.

The objection that the whole amount sold did not arrive, and so the defendants could not deliver it, and the plaintiff might be off, is a singular one in the mouth of the defendants. It is, in plain English, thus: "I have broken my promise, and therefore my promisee has no right to recover damages against me." The defendant made an executory contract with the plaintiff to deliver 50 tons of iron described or rather hinted at as of certain sizes, deliverable out of the Anna's cargo which had not yet arrived. The iron either arrived or it did not; the defendants refusing to deliver it had, in either case, broken their contract. If it arrived, and was under size, or otherwise not answerable to the description, and the promisee waived the objection, then the vendor is entitled to the benefit of the waiver; and should have delivered such iron as he had. At any rate, it is of the essence of a contract, that the promisor or covenantor should be bound, and not have it in his power to discharge himself at his pleasure. *Poth. before cited.* The settled rule of construction, even where the contract expressly provides, that, on non-performance by the promisor or covenantor, it shall be absolutely void, makes it so only at the option of the promisee or covenantee. This was expressly held by the cases just cited from my reports, and from *Barnwall & Alderson* and *Bingham's N. Cas.*

The rule of damages laid down by the chief justice was "cor- [*327] rect. That rule, on breach of an agreement to sell goods, is the market price at the day appointed for delivery, less the contract price, when the latter is not paid, *Dey v. Doz,* 9 *Wendell,* 129, *Clark v. Pinney,* 7 *Cowen's Rep.* 681, without reference to the price at which the vendee may have promised the goods to others in the mean time. If the plaintiff had bound himself to give the iron away to a friend or relation, on what principle could that circumstance be used to affect the damages as between him and the defendants?

The objection most relied on, and certainly the most plausible one, is that arising on the face of the memorandum. This was not literally *subscribed*. The objection rests on the revisers' introduction of this *new* word into our statute of frauds, 2 *R. S.* 70, 2d. ed., instead of the word *signed*, which was the one used in the former statute. It is, I think, enough to answer that the words *signing* and *subscribing*, when applied to a contract or other instrument, always, in common understanding, meant the same thing, viz. a writing of one's name at the bottom. The legislature have themselves used the two words as synonymous in the statute of wills. 2 *R. S.* 7, § 40, 41, 2d ed. So clear and universal was this understanding of the word *signing*, that its use in the old statute was at first supposed to require an actual subscription at the bottom. It was at length agreed however, that the word might have a secondary sense, and indeed must have, or the statute would

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in many cases annul contracts when the name was written or inserted in some other place, with the equally obvious intent of giving authenticity to the instrument. Accordingly an attestation as a witness, a letter written assenting to the terms of some unsigned memorandum, or names inserted in the business memoranda of brokers, auctioneers, &c. though only in the body, if done with intent to preserve evidence of the transaction, were held to be a substantial compliance with the statute, because they placed the matter beyond the danger of mere oral evidence, equally with a literal signing by subscription. *Roberts on Frauds*, 119, Am. ed. of 1807. *Long [*328] on Sales*, 57, et seq., *Rand's ed. of 1839*, *and the cases there cited. *Fell on Com. Guar. ch. 4*, p. 88, et seq. Am. ed. of 1825, and the cases there cited. Even an insertion of the name by the broker in a bare pencil memorandum has been held sufficient. *Merritt v. Clason*, 12 Johns. R. 102. 14 id. 484, S. C. on error.

It requires no greater judicial effort to enlarge the word *subscribe* into a secondary sense, than the word *sign*; and such a sense was perhaps oftener given to the former in common parlance. I do or do not *subscribe* to such a sentiment or doctrine, signifies mere assent or dissent without the act of writing at all; and, indeed, that is one of the principal senses ascribed to the word by Johnson in his quarto dictionary, where it is illustrated by a passage from Hooker. In that he says it simply signifies to give consent, the very object which the statute of frauds is in search of, and it was always satisfied if the name was written or even printed in such a connection or under such circumstances as to indicate consent to become bound. Among other things it looked to the course of business, and found the omission of the name at the bottom very common among brokers, auctioneers and other agents. It adopted such acts as signing because the intent was plain, and they were as much beyond the evil intended to be remedied by the statute, as if the name had been placed at the foot. A judge signs a record in the margin; and there are peculiar places of affixing the name for the purposes of authentication in various branches of business, without coming up to the common notion of signing. With brokers, auctioneers, correspondents, &c. whose acts are very commonly to be tested by the statute of frauds, all must be void, were the courts suddenly to wheel about, and turn their faces against the former principles of construction. They would thus subvert half the contracts of sale in the most commercial portions of the state—a mischief which I admit they must do if the new and revised statutes have left them no alternative. But the principle of construction remains the same, and rests on a broader foundation, and a state of things calling more imperiously for its enforcement in proportion as memoranda of the kind in [*329] question, have long had a direct sanction, "not only in the usages of business, but under the statute of frauds itself. A subscrip-

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tion, by merely inserting the name, is as effectual a guard against perjury and fraud as it ever was. Being out of the mischief which the statute intended to avoid, it is therefore out of the statute itself. If an authority be wanting for such an obvious principle of construction, take the words of Lord Hardwicke in *Welford v. Beazley*, 3 Atk. 503. There the party to be charged had merely put his name as a witness. The lord chancellor said, “The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and, therefore, both in this court and the courts of common law, where the agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon.” The law requires that a bill or note payable to order should be *endorsed*, in order to its transfer, and the subjecting of the payee to certain definite liability; yet if he had put his name on the *face* or *elsewhere* on the paper, or a paper annexed, with intent that the act shall operate as an endorsement, it is the same thing, because the substance of the legal requisition is thus fulfilled. This has been often held.

I will not now do more than advert to the general evil of considering every literal or verbal deviation in our revised statutes from the former acts which they adopt, as a change in substance. We had occasion to consider it in some measure at the last term, especially in respect to the statute of frauds; and daily observation confirms the views then expressed with regard to all such former statutes, as entered into and governed the general business of the community. They made and will continue to make a part of the commercial and social habitude; and even where an alteration was obviously intended, and was plainly expedient or necessary, a century must perhaps go by ere the change will be actually effected. Some fifty or more years have passed since a very necessary alteration was made by statute in the denomination of our currency; and although the necessity was universally conceded, perhaps fifty more will *not practically complete [*330] the change. To make the numerous verbal alterations in our revised statutes, in all or even a majority of instances, an actual departure from the former law, would be to open Pandora’s box. The evils would be intolerable, and the whole community would at once demand their repeal.

Judgment affirmed.

THE AMERICAN INSURANCE COMPANY *vs.* HUTTON.

Where a vessel insured for twelve calendar months, and if *at sea* at the expiration of the term,

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the risk to continue at the same rate of premium until her arrival at the port of destination commenced (when 120 days of the policy were unexpired) a voyage ordinarily occupying 70 days, and in the course of her passages from place to place sprung a leak so that repairs became necessary, and whilst they were making, the specified term expired, it was held, that the insurers were not liable for the loss of the vessel, which happened on her return passage to the port from which she departed when the voyage commenced, she not being *at sea* within the meaning of the policy at the expiration of the specified term.

ERROR from the superior court of the city of New-York. Hutton sued the American Insurance Company on a policy upon the body, &c. of a brig called the *Champion*, for and during the term of *twelve calendar months*, commencing on the 21st January, 1835; averages, if any, to be settled each passage; and if *at sea* at the expiration of the term, the risk to continue at the same rate of premium until her arrival at the *port of destination*. No port of destination is mentioned in the policy; the language of the policy is: "Beginning the adventure upon the said vessel, tackle, apparel, &c at and from the 21st January, 1835, at noon aforesaid, and so shall continue and endure until the 21st January, 1836, at noon aforesaid, and until she be moored twenty and four hours in good safety." The vessel was valued at \$8500, and was insured at a premium of 8 per cent. She sailed from New-York on 28d *September*, 1835, bound on a voyage for St. Barts, Curacao and Maracaibo, and thence back to the port of New-York. The ordinary length of such a

voyage out and home is 70 days. Portions of her cargo were intended for each of the *places above named. On her voyage out she encountered a hurricane which retarded her so that she did not arrive at St. Barts until the 23d day of *October*. She left there on the 26th, and put into St. Thomas (the nearest port where repairs could be made) on the 28th October. There the master of the *Champion* learnt that the city of Maracaibo was in a state of insurrection, and he agreed with the master of another brig, the *Harper*, that if on his arrival at Curacao he should find the intelligence as to Maracaibo true, that he would land at Curacao the portion of the cargo intended for Maracaibo and return and take the cargo of the *Harper* to Philadelphia or New-York. On the 4th *December*, the *Champion* being repaired, set sail for Curacao and arrived there on the 8th December, and the portion of the cargo destined for that place was discharged; and the portion intended for Maracaibo was landed, the intelligence as to the state of that place being confirmed. On the 20th *December*, the vessel sailed from Curacao for St. Thomas for the purpose of taking in the cargo of the brig *Harper*. She did not arrive at St. Thomas until 6th January, having on her passage encountered violent storms. Being very leaky, she was overhauled and it was found that she required extensive repairs, in the making of which she was detained until the 22d day of January, 1836. Having taken in freight, she sailed on the 30th January for New-York, and

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on the 18th February, was stranded on the Delaware beach and totally lost. Had not repairs been necessary, she probably would have sailed from St. Thomas on the *seventh* and certainly long before the *twenty-first* day of January. The necessity for the delay at St. Thomas was wholly occasioned by the damage sustained on the passage to the latter place from Curacao. The repairs were made with all possible despatch. The evidence being closed, the counsel for the defendants insisted that the defendants were protected from liability by the termination of the period of insurance before the loss happened; but the court charged the jury that the risk was not terminated at the time of the loss of the vessel. The counsel for the defendants excepted to the charge, and the jury found a verdict for the plaintiff for \$8694,73; upon which judgment being entered, the ['382] defendants sued out a writ of error.

D. Lord, jun. for the plaintiffs in error.

G. Griffin, for the defendant in error.

By the Court, COWEN, J. The policy in question was on time, for a term of one year certain, from the 21st January, 1835, and if the vessel should happen, at the expiration of the year, to be *at sea*, the policy was to continue till her arrival at the port of destination. At the expiration of the term, the vessel was in fact at St. Thomas, under circumstances which raise the question whether she was in port, or whether constructively *at sea*. Of course she was not literally *at sea*. She had been out to Curacao, and was returning to St. Thomas, with a view to take and transport the cargo of the Harper to Philadelphia or New York, under the agreement with Capt. Pe-drick. Being accidentally disappointed in this, she put into St. Thomas, where she was detained for repairs. Otherwise she would have actually put to sea, before the twelve months had expired. During her detention from necessity, and pursuant to the original intention to proceed from St. Thomas for a port in the United States, she there made arrangements for taking in freight with which, as soon as ready, she sailed for New-York. In her passage she was lost.

The counsel for the plaintiffs in error contends that St. Thomas was her port of destination, at which she had arrived and lay within the meaning of the policy on the day of the year's termination; and that she could in no sense be deemed *at sea*. He admits, however, that the words *at sea* have a secondary meaning; and there are two cases decided by the supreme judicial court of Massachusetts, which hold that a vessel may, under circumstances, be deemed *at sea* within a clause like this, though in fact lying in port. *Wood v. The Marine Ins. Co.* 14 Mass. R. 81. *Bowen v. The*

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Hope Ins. Company, 20 *Pick.* 275. In the first, a vessel bound [*333] to Amsterdam had been captured while in the course of her passage at sea, and carried into a British port (Bristol) where she was when the year expired. The clause, "should this vessel be *at sea* at the expiration of the above period, (a year,) the risk is to be continued until her arrival at a port of discharge," was held to attach. Here she was engaged in the prosecution of her passage, which she actually pursued so soon as she could obtain a clearance. Parker, Ch. J. who delivered the opinion of the court, said: "She was absent on a voyage which had been commenced within the time of the original risk. She would have been protected on that voyage to Amsterdam and back again; because within the common meaning of the term *at sea*, which was undoubtedly adopted by these parties. A vessel is considered in that condition while on her voyage and pursuing the business of it, although during a part of the time she is necessarily within some port, in the prosecution of her voyage. The intention in prolonging the risk beyond twelve months was, unquestionably to give the ship protection under the policy in case that time should expire while the vessel should be employed in some unfinished voyage; and whether in a foreign port or actually upon the high seas, we believe there was no difference in the contemplation of the parties when the contract was made." In the last case, the vessel sailed from New-York on a voyage to Rotterdam, from which place she was to proceed to Bangor, in Wales, for a cargo, and thence to Boston. The vessel reached Bangor, took on board her cargo, unmoored, and dropped down several miles below Bangor; but not being able to get out of the straits on account of head winds she came to anchor; and, though she made sail for several days, did not succeed in getting out of the straits, and proceeding on her voyage till after the year expired. The words of the policy were, that if the vessel should be *at sea*, when the year expired, then the risk was to continue till her arrival at her port of destination and discharge. The continuing clause was held to attach, while she lay confined in the straits, occasionally struggling to escape. The jury found she was not in a harbor on the day when the year expired.

[*334] Another policy which continued "itself if the vessel should be on her passage, was also held to attach at the same time, the words *at sea* and *on her passage*, being considered by the court as synonymous. The court said the words in the policy were used in contradistinction to an *arrival in port*; and the decision turned on the vessel having left her moorings, and got ready for sea. This was held equivalent to being on her voyage or passage. Shaw, C. J. who delivered the opinion of the court, cited and approved *Wood v. New England Mar. Ins. Co.* He remarked that, "if the vessel has sailed or commenced a voyage from one port to another,

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she must be considered to be *at sea*, within the meaning of this clause, from the commencement to the termination of the voyage, although during parts of it she may have sought shelter in a place on the way."

In the case at bar, I think the defendant in error is put to contend for something beyond what is established by either of the cases cited, which are the only direct authorities upon which he relies. The first holds that a vessel being in the course of her voyage, diverted into and lying at a port *in invitum*, is still constructively *at sea*: the latter case holds that being unmoored and ready for sea at an intermediate port of destination amounts to the same thing. In the case at bar the vessel had not been forced into St. Thomas from any cause. She proceeded there as to an intermediate port of destination determined on by the master, as a port of lading; and so far from being ready for sea, she still continued in that port till the year had passed, not having unmoored, but merely engaged in the business of lading. Can a vessel be said to be *at sea* while lying at an intermediate port of destination, though in prosecution of the business which is to carry her to the ultimate one? It is true she is on her general trading voyage, acting with a view to proceed and reach her ultimate port. She is on the voyage round, and in this instance the vessel would have been covered by the policy, if found *at sea* upon the 21st of January; whereas she is lying by and lading on that day in an intermediate port of her own choosing. She had terminated her particular passage. I think the court ^{*below} [*385] must have held that the policy continued till her arrival in the United States, touching at what ports of destination she pleased. But there is nothing in the policy which looks to that. True the voyage in view was a trading rambling voyage, averages were to be settled each passage; and the vessel departed from New-York, where she lay in September, 1835. The *terminus ad quem* is one year; the protection to be continued over on *condition*, viz. if at the *terminus* she happened to be *at sea*. She had been delayed by adverse weather, which prevented her being *at sea*; but such delay was not made a condition. She had been strained, consequently detained in port to be repaired; but that was not made a condition. The policy was not to be continued for either of these reasons. She was making her arrangement to *go to sea*; but she had not yet even unmoored, or began to unmoor. She was not *sailing*, and in her course detained by some subsequent occurrence; and not even ready to sail. *Pettigrew v. Pringle*, 3 Barn. & Adolph. 514. She was on a voyage round, and, if you please, this was contemplated by the parties, though there is no evidence of it; but she was not *sailing* on the voyage; she was not *at sea* on the voyage. The defendants below are not to be made liable on excuses that she could not fulfil the condition. She took that risk, and knew where she must be in order to entitle herself to protection; *at sea*, open to the hazards of a sea voy.

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age, in which case she would be protected only till she reached the port of destination. She asked no more than this; and the reason, I suppose, was that she wanted no more. On her reaching port her owner could re-insure at his leisure; and at the end of her passage, the insurers were bound, as they did do several times, to settle her averages. It would be drawing out this clause to a most unnatural and immoderate length, to say that it ran the whole round of any voyage the master might have raised in his mind; one to the East Indies and home, or round the world, covering every stopping place planned out in the way. The parties do not appear to have had any

definite voyage in their minds; but only random passages to be [*336] undertaken within the year, and "covering the pending passage

in a course of actual prosecution at the terminus. *At sea* was, I think, used in opposition to being *in port*. The words were not used in opposition to her being *at home*. Arriving at the port of destination means, I think, any port of destination, whether at home or abroad for lading or discharge, or any other object or business voluntarily pursued. It would seem to be straining construction beyond all precedent, to hold that, being *in port* on her own business and lying there for weeks, is being *at sea*, in the prosecution of a voyage or passage. It is going quite far enough, if not too far, to say with *Wood v. The New England Mar. Ins. Co.* that a vessel is *at sea*, while lying even contrary to her will in port, without a clearance. To predicate the same thing of her while lying in her own appointed port sounds like a distortion of language, unless we could suppose some secondary meaning established by commercial usage. None such is in proof.

In examining this case, I have given the testimony its strongest possible bearing in favor of the plaintiff below. I have supposed it clearly established, that the vessel was but touching at St. Thomas for a cargo on her way from Curacao to New-York. I have disregarded the argument that such a voyage and such a purpose were questionable on the whole testimony, and that, at least, the jury should have been directed to inquire of them. The protest of the master speaks of the voyage as being from New-York to St. Barts, Curacao and Maracaibo. It says that on failing to obtain the cargo of the *Harper*, he changed his mind, and determined to return to Curacao, and proceed thence on his voyage to Maracaibo; and that he continued to entertain that intention, till the agent on discovering that the expenses occasioned by the repairs had swelled to such an amount as to forbid all farther enterprizes out, peremptorily ordered the brig home. This view is certainly far from strengthening the idea, that she was at sea on a voyage home, or round, when she reached the 21st of January. But admitting that she was, I think, under the circumstances, we must take her to have been constructively [*337] where "she was ostensibly and literally in an intermediate port of destination; so not *at sea*; therefore not within the condition.

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In any view which can be taken of this case on the bill of exceptions, I think the judgment should be reversed ; a *venire de novo* to issue from the court below, the costs to abide the event.

LEE *vs.* TILLOTSON.

Where *referees* are appointed to hear a cause, and the trial actually requires the *examination of a long account*, they have power to allow *damages* for the non-performance of a *special contract*, the same as if the cause had been tried by a *jury*.

The provision in the constitution of the U. S. securing a trial by a *jury*, relates only to trials in courts organized under the constitution and laws of the U. S., and is no objection to a cause being heard by *referees* in the courts of this state ; nor is the similar provision in the constitution of this state an objection. Previous to the adoption of the state constitution, *referees* were well known and sanctioned by statute.

At all events, a party having *waived* a constitutional provision cannot subsequently ask for its protection.

MOTION to set aside a report of referees. The action was *assumpsit* on an agreement in writing, dated January 1, 1825, signed by the parties, by which the defendant, among other things, agreed to furnish 6000 hides annually, for five years, at the Howard factory, Warwarsink, which the plaintiff agreed to tan in the best manner that the nature of the hides would admit of, and to transport them to the city of New-York. The defendant was to allow three cents per pound for the tanning and transportation, and furnish wood, lime, salts, &c. and keep the factory in repair. The plaintiff, in declaring, alleged breaches in not furnishing the stipulated number of hides, &c. The declaration also contained the common counts for work, labor, &c. The cause was referred, by *consent of parties* ; and the report was for the plaintiff \$4594, which the counsel for the defendant now moved to set aside. The referees examined long accounts on both sides and struck a balance, among "other things allowing \$6000 *special damages*" [*388] against the defendant for not furnishing the stipulated amount of hides, &c. in other words, for not stocking the yard as agreed by the defendant. This they did, notwithstanding an objection that they had no legal power to allow special damages. There were other questions passed upon in addition to those in reference to which the opinion of the court was delivered as reported beneath, which are deemed not necessary to be stated. The referees made a report in favor of the plaintiff for \$4594, which the defendant moved to set aside.

L. Mason, for the defendant.

J. Van Buren & H. M. Romeyn, for the plaintiff.

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By the Court, COWEN, J. It was agreed by the counsel for the defendant that the referees had no power to inquire of *damages* for breach of the special agreement, that not being *matter of account* within the 2 R. S. 305. 2d ed. § 40. The trial would obviously require the examination of a long account; and then the statute in terms authorizes the court to refer *the cause*, that is to say, the whole matter. Such has been the uniform practice. On the cause going down, every thing inquirable into on a trial should be heard and decided by the referees; otherwise, a reference must be withheld on its appearing that the most trifling matter, a small note for instance, might be introduced at the hearing. The statute, so far from restricting the power of reference to matters of account, alone, does not even confine it to actions arising *ex contractu*, though we have in practice confined it to such. The limitation ought not farther to be narrowed by construction, when we consider how precious is time in some of our circuits.

But it is said the right to refer is absolutely unconstitutional, as being contrary to the seventh article of the amendments to the constitution of the United States. That, however, relates to such courts only as sit under the authority of the United States. In respect to the forms of [*389] proceeding "in suits, the constitution and laws of the United States are regarded as those of a foreign government.

But the seventh article (§ 2) of our own constitution declares, that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever;" and the case before us is supposed not to come within the exception. It is a satisfactory answer, however, that references as broad as that now contended for by the plaintiff, were sanctioned by statute, and practised by the courts long before the adoption of the constitution.

The objection calls for the less countenance in this case, inasmuch as the parties mutually consented to the reference by writing. This of itself is a waiver of the objection, even if the constitution stood in the way. A party may waive a constitutional as well as a statute provision made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the constitution has secured him a trial by jury.

Motion to set aside report of referees denied.

END OF JULY TERM.

C A S E S
A R G U E D A N D D E T E R M I N E D
I N T H E
S U P R E M E C O U R T O F J U D I C A T U R E
O F T H E
S T A T E O F N E W - Y O R K ,

I n October Term, in the sixty-fifth year of the Independence of the United States.

Cox and others, superintendents of the poor of the county of *Genesee* vs.
SMITH and others, superintendents of the poor of the county of *Allegany*.

An action will not lie by the *superintendents of the poor* of one county against the superintendents of another county for the maintenance of a pauper removed from the county of the latter without legal authority, into the county of the former, where the removal is made at the request of the pauper, so that he may be under the care of his family and friends, and without any intent on the part of the person removing him to make the county into which he is removed chargeable with his support.

It seems, that the bringing of a pauper into this state, will not subject the person bringing him to the penalties of the act on this subject, unless it be done with the intent of subjecting some particular town or county to the charge of supporting such pauper.

THIS action was tried at the Allegany circuit, in October, 1839, before the Hon. ROBERT MONELL, one of the circuit judges.

The suit was brought to recover moneys expended by the plaintiffs in the support of a *pauper*, for whom it was alleged the defendants were bound by law to provide. The plaintiffs in a special count of the declaration alleged that on the 15th December, 1838, at Pike, in the county of Allegany, one *Robert Flint* became sick and infirm, and according to the provisions of the act entitled "Of the support and relief of indigent persons," became chargeable to the county of Allegany; that afterwards, to wit, on, &c. one *David Flint*, an inhabitant of Allegany, removed and trans-

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Albany, October, 1840.—Coe v. Smith.

ported Robert from the county of *Allegany* to the county of *Genesee*, with intent to make the county of *Genesee* chargeable with the support and relief of *Robert*. The plaintiffs also averred that *Robert* did become chargeable to the county of *Genesee*, and had been supported by such county as a *pauper* from the time of his removal to the commencement of this suit; and that before and at the time of his removal, he was a *pauper*, and a charge upon the county of *Allegany*. The declaration also contained the common money counts.

On the trial of the cause it was shown that *Robert Flint* being a pauper and resident of the county of *Genesee*, was bound out by the superintendents of that county as an apprentice; that he left his master and went to the residence of *Samuel Flint*, an uncle of his, in *Allegany*, where, in the month of August, 1838, he received a wound from a scythe, by which he was deprived of the use of one of his legs, and which disabled him from working; that his uncle supported him and procured medical attendance for him until late in December, 1838, when, at the request of the pauper, he was removed to the residence of his mother, in the county of *Genesee*, who was very poor, and unable to provide for him. On the 31st December, an overseer of the poor of the town in which the mother of *Robert* resided, took charge of him and supported him at his mother's house until the 11th February, 1839, when he was removed to the county poor house of *Genesee*, and there supported at the expense of the county, which was proved to be \$90. The superintendents of *Allegany* did not contribute to the support of the

[*343] "pauper, whilst he remained at the house of his uncle. The only interference on their part was, that on the day preceding the removal of the pauper, one of them called with a physician to ascertain his ability to undergo the fatigue of the removal. He was removed by *David Flint*, a son of *Samuel Flint*. The judge charged the jury that if there had been any interference by others, or if the pauper had received the aid or assistance of any person in his removal from *Allegany* to *Genesee*, the defendants were liable; that it was wholly immaterial, as between the parties to the suit, who had procured such aid or assistance, or from what motive or with what intent it had been procured or rendered; that the evidence fully established a sending and transporting of the pauper within the meaning of the statute; and that there was no question for them to determine except the amount of damages which the plaintiffs ought to recover. The jury found for the plaintiffs with \$90 damages. The defendants ask for a new trial.

M. T. Reynolds, for the defendants.

C. P. Kirkland, for the plaintiffs.

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By the Court, NELSON, Ch. J. This action is given by statute ; and the principle upon which it is to be maintained will depend on a construction of several sections of the act under which the suit is brought.

By the 63d section of 1 R. S. 633, any person who shall send, carry, transport, remove or bring, or who shall cause to be sent, carried, transported, brought or removed, any poor or indigent person, from any city, town, or county to any other city, town or county, without legal authority, and there leave such poor person *with intent to make any such city, town or county, to which the removal shall be made, chargeable, &c.* or *who shall entice any such poor person to remove with such intent,* shall forfeit fifty dollars. &c. By the 64th section, the pauper *so removed, brought or enticed,* shall be maintained by the superintendents of the county where he may be ; they shall give notice to the overseers **of the poor of [*344] the town from which he was brought or enticed if such town be liable for his support;* if there be no town in the county from which he was brought liable to his support, then the notice is to be given to the superintendents of the poor of such county, informing them of such *improper removal,* and requiring them to take charge of the pauper. By the 65th section, the superintendents or overseers to whom notice is given shall within thirty days take and remove the pauper, &c. or within that time notify the superintendents giving the notice, that *they deny the allegation of such improper enticing or removal, &c.* By the 67th section, upon such notice of denial the superintendents shall within three months commence a suit against the overseers of the poor of the town, or the county superintendents or their successors, for the expenses incurred in the support of such pauper, &c.

From an attentive consideration of these provisions it appears obvious to me, that a *removal* of the pauper which will charge the county with the expenses of his maintenance, must be such as would subject the person concerned in it to the penalties imposed by the 63d section of the act. This is clearly the removal referred to throughout the several provisions on the subject ; and which the defendants were required to deny. The plaintiffs are to give notice to the superintendents of the county from which the pauper was brought or enticed, informing them of such *improper removal,* and they are to deny the allegation of such *improper enticing or removal.* This is the preliminary issue raised between the parties before the commencement of the suit.

The ground taken by the plaintiffs supposes that the legislature intended to prohibit a destitute person, or one who happened to be disabled, while temporarily residing in one county, from returning to his family and friends residing in another, though he might choose to do so of his own mere motion ; or as a matter of course, to charge the county from which he thus removed with his support. This seems to me a forced and unreasonable con-

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[*345] struction ; and overlooks *the intent of the removal*, which is made an essential ingredient "to constitute the offence within the act, and is, I think, equally necessary to create the legal liability in the civil suit.

Even where a person brings a pauper from any place out of the state into a county within it, he is neither subject to the penalty, or to the maintenance of the pauper, as imposed by the 64th section, without the existence of *an intent* to charge the county.

I am of opinion, therefore, that the learned judge erred, and that a new trial must be granted.

DELAFIELD *vs.* KINNEY, President of the Erie County Bank.

A suit against an association formed under the *general banking law*, may be brought against it either in the name of the association or in that name, with the addition of the name of the president thereof; but the contract must be stated as having been made by, or with the bank using the name by which it acquires rights of action and contracts liabilities, or the declaration will be bad.

It is not necessary to allege in the declaration, that the notes or bills issued by such association, were signed by the president or vice-president and cashier thereof; it is enough to allege in general terms, that the association *made* the contract.

Whether certificates of deposit made by these associations are *negotiable instruments*, enabling an endorsee to bring an action in his own name, *quere*.

So also *quere*, whether these associations have authority to make *post-notes*, or any *negotiable notes*, save such as are issued under the sanction of the *comptroller* of the state.

DEMURRER to declaration. The *first count* is as follows: John Delafield, of the city of N. Y., plaintiff in this suit, by E. S. V., his attorney, complains of *George N. Kinney, president of the Erie County Bank*, an association formed under the laws of this state entitled "an act to authorize the business of banking," passed April 18th, 1838, and doing business at Buffalo, defendants in this suit, in a plea of trespass on the case upon promises pursuant to the statute: for that whereas *the said Erie County Bank* on the 10th July, 1839, at Buffalo, to wit, at, &c., made a certain note in

writing commonly called a certificate of deposit, bearing date [*346] &c., and then and there delivered the said note or certificate of deposit, to one William Vandervoort, by which said note or certificate of deposit, the said defendant declared and certified that the said William Vandervoort had deposited in that bank at seven per cent interest, ten thousand dollars, subject to the said Vandervoort's order thereon, payable at the New-York Banking Company, in the city of New-York, six months after the date thereof. It was then stated in the usual form of de-

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claring on negotiable bills, that V. endorsed the note to the plaintiff, of which the *defendant* had notice. By means whereof the *defendant* became liable to pay the plaintiff, &c.; and in consideration thereof the *defendant* promised, &c.

Second count. And whereas also, the said *defendant*, on, &c., at, &c. made a certain other note in writing, commonly called a certificate of deposit, by which said note the said *defendant* declared and certified that the said W. V. had deposited in the said Erie County Bank at seven per cent interest, \$10,000, subject to the said W. V.'s order thereon, payable at the New-York Banking Company, in the city of New-York, six months after the date thereof; and then stating the endorsement of the note and the liability and promise of the *defendant* as in the first count.

Third count. And whereas also the said *defendant*, on the same day and year and at the place last aforesaid, made a certain note in writing, *the handwriting of E. E. Smith, cashier of the said Erie County Bank, being thereto subscribed*, commonly called a promissory note, by which said note the said *defendant* promised to pay to the order of the said W. V., six months after the date thereof, the sum of \$10,000, with interest, &c. at the New-York Banking Company, in the city of New-York. The endorsement of the note to the plaintiff, notice to, liability of, and promise by the *defendant* were then set out in the usual form. Special *demurrer* to each count, and *joinder*.

The case was submitted upon written points, without argument.

**S. Stevens*, for the defendant.

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E. S. Van Winkle, for the plaintiff.

By the Court, BRONSON, J. Corporations formed under the general banking law may, like other bodies politic, sue and be sued by their original corporate names. True, the statute provides that suits by or on behalf of the association *may* be brought in the name of the president thereof; and that persons having demands against the association *may* maintain actions against the president. *Statutes 1838*, p. 250, § 21, 22. But there are no negative words, nor any thing going to take away either the right or the liability which the law attaches to every person, whether natural or artificial, to sue and be sued for the redress of injuries. A legal being, having capacity to transact business like an individual, and yet wanting power to assert its rights, and not subject to legal process when in the wrong, would be a strange anomaly in the law. The power and liability to sue and be sued, are necessarily incident to every corporation. This is so at the common law, and by express enactment. 1 *R. S.* 599, § 1, 2. T^r

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banking law has not repealed this provision ; it has only superadded another form in which injuries may be redressed.

Suits may be brought in either form ; but whether in the one or the other, it is a matter in which the president has no personal concern. It is the suit of the bank. In one form the bank sues or is sued by its original corporate name ; in the other, it sues or is sued by that name, with the addition of the name of the president. Both are corporate names—the one “to be used in its dealings,” § 15, and the other to be used in legal proceedings. § 21, 22. A corporation may have several names, and one name may be used for one purpose, and another for another purpose. Its name may be received either mediately or immediately from the creating power, or it may be required by reputation. A bank under this law is authorized

to choose its own name, but it is required to have one, “to be [*348] used in its dealings,” § 15 ; and it may appear in court by “that name simply, or with the addition of the name of its president. § 21, 22. If the latter form is adopted, it is still just as much the suit of the bank as though the name by which it deals were used ; and the only difference in framing the declaration, whether the suit be for or against the corporation, consists in the mode of stating the name in the commencement. The contract must be stated as having been made by or with the bank—using the name by which it acquires rights of action and contracts liabilities.

In this case, the plaintiff proceeds against the company, as he may do by law, by adding the name of its president ; and the first count very properly commenced by alleging that the contract was made—not by the president—but by the bank. This distinction is, however, soon lost sight of ; for after stating that the bank made a certain note or certificate of deposit, the pleader proceeds to say, that by the note or certificate the *defendant* declared and certified—the *defendant* had notice of the transfer of the note, became liable, and promised to pay the plaintiff. If the “*defendant*,” as the pleader has used the word, means “George N. Kinney, President of the Erie County Bank,” and not the bank itself, the plaintiff has failed to show any cause of action against the company. And the count does not show a good cause of action against “George N. Kinney,” because it commences by alleging that the note was made by “the Erie County Bank,” and Mr. Kinney is not answerable for their undertaking.

I was at first inclined to think the count might be supported on the ground already suggested, that each of these associations has two corporate names, by either of which it may sue or be sued. This company is sued by one of its names, to wit, “George N. Kinney, President of the Erie County Bank ;” and then the word “*defendant*,” as used in the count, refers to, and means the corporation—not the individual. But the difficulty

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with this view of the case is, that the name by which the company is sued, is not the name by which it is authorized to deal ; and the plaintiff, *consequently, fails to show that the bank made a valid contract. [*349]

The pleader should have alleged that "the Erie County Bank" made the note, had notice, became liable, and promised to pay. That part of the count which states that the defendant became liable, and in consideration thereof promised, &c., might, perhaps, be rejected as surplusage. But the difficulty will still remain, for in stating the express contract, the pleader alleges, that the *defendant*—meaning, as has already been seen, either that George N. Kinney personally, or the bank by a name in which it is not authorized to contract, *declared and certified*.

The demurrer objects to this count on another ground. The statute provides, that "contracts made by any such association, and all notes and bills by them issued and put in circulation as money, shall be signed by the president or vice president and cashier thereof." § 21. But I think it is not necessary to set out the particular manner in which the bank contracted. It is enough to allege, in general terms, that it made the contract. That can mean nothing less than that the business was transacted in the forms prescribed by law.

In the second count the word *defendant* is used throughout. If this means *George N. Kinney*, and not the bank, the count is fatally defective ; for it only alleges, that Kinney by a note in writing, declared and certified to a fact—not that he made a promise. Let us insert his name, and see how it will then read. The plaintiff complains, that *Kinney* made a note in writing, by which he *declared and certified* that Vandervoort had deposited a sum of money in the *Erie County Bank*, subject to Vandervoort's order, payable at, &c. six months after date. If this shows a liability in any quarter, it certainly must be on the part of *Erie County Bank*, in which the money was deposited. Kinney only certifies to the fact of a deposit and the terms on which it was made, without himself undertaking to refund the money. And if he had promised to account for the money which the bank received, the promise would be void for the want of consideration. It is not alleged that the deposit was made at his request or for his benefit. [*350]

But I suppose the pleader meant the bank, and not Kinney personally ; and in this view of the case, the difficulty has already been suggested. The plaintiff declares that the *defendant*—that is, "George N. Kinney, President," &c.—made the note. Although the bank may be sued in that form, it had no authority to make a contract by that name.

The third count, though apparently upon a different contract, is subject to the same objection, that it does not state a promise by the bank. It alleges that the *defendant*—that is, Kinney, the president, made a certain note,

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commonly called a promissory note, &c. That might do to charge him personally. But I suppose the plaintiff intended this as a declaration against the bank ; and none of the counts show that the bank made a contract.

Whether the certificates of deposit mentioned in the two first counts are negotiable instruments which will enable the plaintiff to sue as endorsee for the money deposited ; and whether these associations have authority to make post notes, or any negotiable promissory notes save such as are issued under the sanction of the comptroller, are questions which have not been discussed, and upon which we therefore forbear to express any opinion.

Judgment for defendant.

GAREY vs. NICHOLSON.

Where a party on the trial of a cause avails himself of an *admission* of his adversary to sustain his action or defence, the opposite party is entitled to prove such *other parts of the conversation had on his part* as tend to *explain, modify* or even *destroy* the admission made by him ; but is not at liberty to call for such parts of the conversation had by him, as relate to assertions made *operating in his favor* upon the general merits of the case, but having no connection with the *admission* made.

[*351.] *ERROR from the Tompkins C. P. Nicholson sued Garey in an action of *trespass* for taking a mare. The mare was taken by the direction of the defendant, a constable, from the stable of the plaintiff, by a son of the plaintiff, and received by a third person, the defendant claiming that he took the mare by virtue of an attachment in favor of one *Pine*. The defendant's counsel *asked for all the conversation between the defendant and the witness at the time*. This was objected to by the plaintiff's counsel, and the objection sustained by the court. To which decision the defendant's counsel excepted. An exception was also taken by the defendant's counsel to the *charge* of the court. The plaintiff obtained a verdict, upon which judgment was entered, and the defendant sued out a writ of error. This court *reversed* the judgment and awarded a *venire de novo* on the ground of the *misdirection of the jury* in the charge of the court. In reference, however, to the *first exception*, this court sustained the decision of the C. P. and in reference to that exception, the following opinion was delivered.

C. Humphrey, for the plaintiff in error.

Ben Johnson, for the defendant in error.

By the Court, Cowen, J. The plaintiff, in order to fasten the trespass

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on the defendant, proved by his son that the defendant had attached the mare, declaring at whose suit ; and that after this, by the defendant's direction, the witness had taken the mare from the plaintiff's stable and delivered her to the defendant. Then, under the rule that, where the defendant's admission is resorted to as evidence against him, he is entitled to have the whole conversation of which the admission made a part disclosed, his counsel called for it in the general words of the rule. That, however, must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification ; and if not so restrained, might operate as a waste of time. Other subjects might be introduced having no connection with the subject matter of the suit.

*But we apprehend the rule must be still farther restrained ; [352] and that even though the additional matter called for may respect the subject matter of the suit, and make in favor of the party whose declaration is in question, it is not, therefore always to be received. The object of the rule is to prevent his being misunderstood in the particular matter to which he spoke ; and hence it is well settled that, to warrant that part of the conversation which makes for him, it must relate to what his antagonist has called for by questions on his side ; or by his course of examination. *Winchell v. Latham*, 6 Cowen, 682. *Ex'r of M'Kane v. Bonner*, 1 Bailey, 113. He must be fairly made a party to the admission of his own act ; and so far the additional conversation may be introduced to explain or qualify the admission he called out. Thus, should he examine as to the admission of a debt being due, no doubt a declaration in the same conversation that it had been paid, released or otherwise discharged should be received. But suppose you were to inquire whether the defendant sought to be charged as an endorser had admitted that he had received due notice of dishonor, would it follow that he could show as a part of the same conversation, an assertion that the endorsement was a forgery ? A witness was adduced to show a demand and a refusal in trover ; and the court would not allow the conversation to be carried out by proving what the defendant said as to the ground of his defence. *Green's Ex'r v. Anderson*, 1 Bailey, 358. A late case in the king's bench held the same doctrine. The case was for a malicious arrest for £60 : when, as the plaintiff insisted, that sum was given to him by the defendant ; and the action of the latter was defeated on the trial by proof of that fact. The now plaintiff had indicted one of the defendant's witnesses, who swore on the trial of the defendant's action, for perjury. On trying the indictment, the now plaintiff was a witness ; and while on the stand he made an admission that he had been remanded by the court for the relief of insolvent debtors. This fact was deemed material for the

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[*353] defence on the trial of the final action for the malicious arrest; and the defendant's counsel accordingly "drew it out on cross-examining one of the plaintiff's witnesses. The plaintiff then offered to show that, on the same occasion, he stated the £60 to have been a gift. That was held inadmissible, though admitted to be a part of the same conversation. Lord Denman, Ch. J. who delivered the opinion of the court, after advisement, recited and commented on the broad language of the rule as laid down in the books of evidence, and especially as cited in 1 *Starkie's Ev.* 180, 2d ed. from the language of Lord Tenterden in the *Queen's case*, 2 *Brod. & Bing.* 297, 298. His language is, that every part of the conversation respecting the subject matter of the suit may be called for, though disconnected with the part first inquired for, and in no wise tending to explain or qualify it. To this language, in its full extent, Lord Denman said the court could not assent. Even where the testimony is intended to carry out the whole of the contradictory statement of a witness, the court thought the added conversation must be in some way connected with the statement alleged to be contradictory. They denied that any rule letting in the entire declaration of the party merely because it related to the subject matter of the suit, had the countenance of authority. The rule laid down on the trial of the action for the malicious arrest was that the entire conversation might be called out in reply, so far as it could in any way qualify or explain the statement first inquired for, but no farther, though it related to the subject matter of the suit for the arrest. And this restriction was sustained by the bench. The chief justice said nothing would be more easy than to find examples of the extreme injustice that might result from the larger inquiry which was insisted on. In the particular case, because the plaintiff was shown to have said he was insolvent, he would have been allowed without any reference to his insolvency to furnish evidence in support of material averments in his case. *Prince v. Samo*, 7 *Adolph. & Ellis*, 627.

In the case at bar, had the proposition made in the court below been acceded to, in its general language, the defendant below might have enquired of his own declarations going to make out a case of fraud ; [*354] though they were called "for merely to connect him with the witness in taking away the mare, and indeed other matters entirely irrelevant to the issue. The first would have been contrary to the cases in the supreme court of South Carolina and the king's bench, both of which we think impose a reasonable restriction. But even if these cases were questionable, surely the rule never intended, to let in a distinct subject : such as the moral character of the parties or their standing in the neighborhood. The broad terms of the proposition would have gone to that extent.

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BISSELL vs. CORNELL.

Words charging a party with aiding in procuring an *abortion* (a crime created by statute) when speaking of him as having had illicit intercourse with a woman, are actionable *per se*; if the words were spoken in a sense other than that of imputing the crime, it is incumbent upon the defendant to show that they were so spoken.

Evidence that the plaintiff aided in procuring the abortion, is inadmissible, unless the notice of justification shows that in so doing the statute was violated.

A notice of justification must in substance be as definite as a plea, though it need not partake of its form or technicality.

After an equal number of witnesses have been sworn on each side in the impeaching or supporting of the character of a party or witness, it is in the discretion of the presiding judge whether a greater or farther number of witnesses shall be examined.

This was an action of *slander*, tried at the Oneida circuit in October, 1838, before the Hon. PHILo GRIDLEY, one of the circuit judges.

The words alleged to be spoken by the defendant, were that the plaintiff had had criminal connexion with one Eunice Tousey and had assisted her in procuring an *abortion*. The declaration contained several counts in which the words were varied, but in all, the same charge was substantially set forth. In the introductory part of the declaration, the plaintiff stated that he was a true, honest, just and faithful citizen; that he had never been guilty, and until the time of the committing of the grievances, &c., had never been suspected to have been guilty of *administering to any pregnant woman any medicine, &c., or of having used any instrument or other means whatever, with the intent thereby to produce the miscarriage of such woman*, or any other such crime. The plaintiff further stated that before the committing of the grievances by the defendant, one Eunice Tousey had been in feeble health and in need of medical assistance, and had applied to him for such assistance, which he had accordingly rendered; that the defendant well knowing the premises, but contriving and wickedly and maliciously *intending to injure the plaintiff in his good name, and to cause it to be suspected and believed by his neighbors and other good and worthy citizens, that he had been and was guilty of procuring an abortion, and to subject him to the pains and penalties of the laws of this state made and provided against and inflicted upon persons guilty thereof*, heretofore, to wit, on, &c. at, &c., spoke and published of and concerning the plaintiff, these false, scandalous, malicious, and defamatory words following, that is to say, &c., (setting forth the words.) The defendant pleaded *non cul* and accompanied his plea with a notice, that on a trial of the cause he would give in evidence, and insist *in bar of the plaintiff's right of action*, that before the time of the speaking of the words in the declaration mentioned, Eunice Tousey, of, &c., had been pregnant, and while so pregnant the plaintiff furnished her with instruments or an instrument, for the purpose of

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procuring an abortion ; that the plaintiff had criminal connection with Eu-nice Tousey, and got her with child, and assisted her in procuring an abor-tion. On the trial of the cause, the words as laid down in the declaration were proved. The defendant's counsel moved for a nonsuit, on the ground that the words alleged to have been spoken by the defendant were not *per se* actionable ; that there was no averment in the declaration pointing the mean-ing of the words or showing them to have been spoken in a criminal sense ; and that the exceptions of the statute were not negatived. The judge refus-ed to grant a nonsuit. The defendant then offered to prove *the facts set forth in the notice* accompanying the plea ; to which testimony [*356] the plaintiff objected, on the ground that the notice was not "suffi-ciently specific, and did not state any offence committed by the plaintiff. The judge sustained the objection, and the evidence was rejected. *Sixteen witnesses* were called and examined by the defendant, for the pur-pose of impeaching the general character of the plaintiff with a view to the reduction of damages. A similar number of witnesses having been called and examined by the plaintiff in support of his character, the defendant of-fered to produce other and further witnesscs in impeachment, but the judge refused to hear any further testimony on the subject. The plaintiff had a verdict, and the defendant having excepted to the several decisions made by the judge as above stated, now moves for a new trial.

W. M. Allen & C. P. Kirkland, for the defendant.

J. A. Spencer, for the plaintiff.

By the Court, NELSON, Ch. J. By statute, 2 R. S. 578, § 21, it is en-acted that every person who shall administer to any pregnant woman any medicine, &c. or use or employ any instruments, &c. with intent thereby to procure the miscarriage of any such woman, unless the same be necessary to preserve life, or be by the advice of two physicians, shall, upon convic-tion, be punished by imprisonment, &c. See also p. 550, § 9, where the pun-ishment is enhanced if the woman be quick with child, and there be an in-tent to kill the child.

The above act makes the simple attempt to procure the abortion of a preg-nant woman, beyond the excepted instances, an indictable offence ; and then, according to the rule given in *Brooker v. Coffin*, 5 Johns. R. 188, words im-puting to a person this crime are actionable *per se*. See also 13 Johns. R. 275 and 124. The words here impute an indictable offence, involving mor-al turpitude.

It is insisted that the words, as set forth in the declaration, do not neces-sarily convey the charge in a criminal sense ; and that their natural import

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is not sought to be varied by averment or innuendo. The counts are inartificially and "loosely framed ; but looking at them in connection with the prefatory matter, we are of opinion the words should be regarded as used offensively, and as sufficient to put the party to his defence. The language accompanying the particular charge fairly implied that the defendant intended to put it forth in a criminal sense, and that the hearers should so understand it. If any explanation was given at the time, negativing this conclusion or effect upon the hearers, it should have been shewn by the defendant. Nothing of the kind appears.

It is also urged that the court erred in rejecting the evidence offered in justification ; that the notice under the general issue was as broad as the charge. If we are right in our conclusion that the words as laid, in connection with the prefatory averments, impute to the plaintiff a crime within the 21st § of the statute, the notice falls short of a defence. It does not fix upon the plaintiff the crime ; it simply charges him with assisting E. T. in procuring an abortion, without any averments bringing the act within the statute. The general rule is, that a plea of justification must contain the same degree of certainty and precision as are requisite in an indictment for the crime. A notice need not partake of the *form* and *strict technicality* of a plea ; but it must be the same in substance and effect. The offence must be unequivocally put forth to avoid surprise. *Starkie on Sl.* 339. 13 *Johns. R.* 475. 19 *id.* 349.

We have, heretofore, held that the judge at the circuit may exercise a sound discretion as to the number to be sworn of impeaching and supporting witnesses. There must be some limit. Any one familiar with trials must be aware, that after some dozen of witnesses on a side have been examined, equally supporting and impeaching a party or witness, very little additional benefit is derived by enlarging the number. The relative strength of the testimony will be the same, however extended the examination. A balanced public opinion will appear.

New trial denied.

*LOWERY and others *vs.* SCOTT.

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Notice of protest sent per mail, directed to the drawer of a bill of exchange at the place where the bill on its face purports to have been made, is not sufficient to charge the drawer, *where no inquiry is made as to the place of his residence.*
Where, in such case, the bill at maturity is in the hands of an endorsee, great diligence is not required ; but some inquiry must be made.

THIS was an action of *assumpsit*, tried at the New-York circuit in June, 1838, before the Hon. OGDEN EDWARDS, one of the circuit judges.

Albany, October, 1840.—*Lowery v. Scott.*

The action was brought by the plaintiffs as endorseees against the defendant as drawer of a bill of exchange, dated *Michigan City*, 26th July, 1836, for \$250, payable to the order of E. Ashton, at the North River Bank in the city of New-York. The bill was drawn upon J. C. Van Rensselaer of *Utica*, N. Y. At maturity the draft was protested for non-payment, and notice of protest sent per mail, directed to the defendant at *Michigan City*. It was admitted by the plaintiffs that the defendant was a merchant and had resided and done business at *Waterford*, in this state, for the last six or eight years. The defendant also introduced testimony tending to show that the plaintiffs must have had knowledge that the defendant resided at *Waterford*. The judge charged the jury that neither the *plaintiffs*, or the *notary*, who was the plaintiff's agent, under the circumstances of the case, were bound to use diligence to ascertain the residence of the defendant; that if they should be of opinion that the plaintiffs did not know the residence of the defendant, then the plaintiffs were not bound to make any inquiries for his residence, and were entitled to a verdict. The counsel for the defendant excepted to the charge of the judge, and the jury found a verdict for the plaintiffs.

E. H. Kimball, for defendant.

E. H. Batchford, for plaintiffs.

[*359] *By the Court, BRONSON, J. The bill bears date at *Michigan City*, in the state of *Indiana*; it was directed to a person residing in *this state*, where payment was demanded, and notice of protest was sent to the *drawer* by mail, directed to *Michigan City*. Before, at and after the time when the bill was drawn, and when it was protested, the drawer resided, and carried on business as a merchant at *Waterford*, in *this state*, and no inquiry was made for his place of residence. The question is, whether the holders have used due diligence. I think they have not. In the case of an *endorser*, it clearly would not be sufficient to send notice to the place where the bill is dated, without showing something more. But it is said, that will do in the case of a *drawer*. Although there may be a slight presumption that the drawer resides at the place where the bill purports to have been made, it cannot be very strong; for it is matter of common experience, that men draw bills when absent from home, on business or for pleasure, and date them at the place where they are drawn. As the plaintiffs are endorseees, and not original parties to the bill, it is not to be presumed that they knew where the drawer resided. But I think they were bound to make some inquiry on the subject at the place where payment was demanded. The defendant had for several years been a merchant in *this state*, and would be likely to be known in the city of New-York where the demand

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was made. But whether so or not, I think the plaintiffs, or their agent, the notary, should, at least, have asked the drawee of the bill where the drawer resided.

In *Chapman v. Lipscombe*, 1 Johns. R. 293, the bill was dated at *New-York*, where the acceptors resided, and two notices of protest for the *drawers* were put in the post office at *New-York*, one directed to them at that place, and the other at *Norfolk*, Virginia, when they in fact resided at *Petersburgh* in that state. But the clerk testified, that "he made diligent inquiry after the defendants [the drawers] at the banks in *New-York* and elsewhere, and the information was, that they resided at *Norfolk*," where one of the notices was sent. This was held to be "due diligence;" and it was afterwards called "great diligence;" per *Spencer*, *J. [*360] in *The Bank of Utica v. De Mott*, 13 Johns. R. 432. In *Fisher v. Evans*, 5 Binney, 541, the precise point arose, and it was held not to be sufficient to send notice to the drawer at the place where the bill was dated, when in fact he lived at another place, and no inquiry was made. *Tilghman*, Ch. J. said, "I can find no such principle as that for which the plaintiff contends, that the place where the bill is drawn must be taken to be the residence of the drawer." The same point arose, and was decided in favor of the drawer, in *Barnwell v. Mitchell*, 3 Conn. R. 101. We are not referred to any cases holding a different doctrine, nor have any fallen under my observation.

I do not think the holder should be required to push his inquiries very far in a case like this. The drawer can always guard against the misdirection of notice by adding his place of residence to his name. But there is no rule of law which requires him to do so; and I am not prepared to say, that the holder may omit to make any inquiry whatever, and content himself with sending notice to the place where the bill is dated, if that turn out not to be the residence of the drawer.

New trial granted.

BURNS *vs.* KEMPSHALL & EGGLESTON.

Where a note had been transferred by the payee, and an action was brought upon it by the holder against the maker, the payee, called as a witness by the maker, was held to be *priuileged* from answering questions put to him for the purpose of showing any *agreement* respecting the note or the *consideration* thereof, or any *payment* thereupon to him, the defendant having avowed that his defence was *usury*, and that *usurious* interest had been received by the payee, as the tendency of the answers might be to *subject himself* either to a *penalty* or to an *indictment* for a *misdemeanor*.

THIS was an action of *assumpsit*, tried in December, 1839, before the Hon. NATHAN DAYTON, one of the circuit judges.

Albany, October, 1840.—*Burns v. Kempshall.*

The suit was brought on two promissory notes made by the defendants, payable to E. Pelton or bearer, one for \$440, dated 22d June, [*361] 1836, and the other for \$488, dated 4th February, 1837. After the plaintiff had proved the making of the notes, the counsel for the defendants opened by stating that the defence which would be relied upon was *usury*, and that Kempshall, one of the defendants, *had paid to Pelton, the payee of the note, various sums of money, amounting to about three per cent per month, for forbearance upon the notes declared upon*, and called *Pelton*, the payee of the note, as a witness in the cause. The witness being sworn, the counsel for the defendants asked him *what was the consideration of the note of the 22d June, 1836.* To which question counsel in behalf of the witness *objected*: insisting that the witness was not bound to answer, as his doing so might tend to convict him of a misdemeanor, or expose him to a penalty or forfeiture. The judge allowed the objection. The following questions were then put to the witness, all of which, on objection being made, were overruled: Did Kempshall, at the time you took the notes, pay you any money? Was there any agreement between you and the defendants, or either of them, in regard to the consideration or subject matter of the note, at the time or previous to the giving thereof, and if so what was the agreement? Did you at the time of making the note, or at any time before or afterwards, advance to the makers, or to either of them, any money upon the same; and lastly, Did the defendants, or either of them, ever pay you any money for interest upon the note? As to the *second note*, the witness testified that he received it at about the time of its date, and remained the owner and holder thereof until about the 1st June, 1837. The same questions, in substance, were then put to him in respect to this note, which were put in reference to the first note—all of which were overruled. The following question was then put to him in reference to *both notes*: “Was there any agreement between you and the defendants, before or at the time when the said notes or either of them was given, with respect to the rate of interest which the defendants, or either of them, were to pay upon the notes, or either of them, or upon any money loaned by you to the defendants, or either of them, which was the consideration of the said notes, or of either of them?”—which question was also overruled. [*362] “The defendants excepted to the decisions of the judge, and the jury having rendered a verdict for the plaintiff, the defendants now asked for a new trial.

C. P. Kirkland, for the defendants, insisted that a *penalty* being imposed by the statute for taking *usury*, an indictment for a *misdemeanor* did not lie at the time when the notes in question were given. Besides, the *prohibi-*

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tion of the statute extends only to the taking and receiving of more than the legal rate of interest, and not to the usurious agreement. The *penalty*, by way of forfeiture of the notes, would not have been incurred by the witness, but by the holder of the notes. It is true, whatever money the witness had received above the legal rate of interest might have been recovered back from him; but such liability is not a penalty. He always was liable to refund in an action for money had and received. The witness also might have relieved himself from all liability by a discovery and return of the money. He therefore ought not to have been excused from answering the questions put to him on the trial.

W. Tracy, for the plaintiff. The taking of usury is a misdemeanor both at common law and by statute. The act of 15th May, 1837, merely enlarged the punishment. Being subject to an indictment, the witness was privileged by law from making any answers which might have had a tendency to convict him of the offence.

By the Court, COWEN, J. The defendants' counsel started with the avowed purpose of proving not only that the notes were made on an usurious consideration, but that usurious interest had been received upon them. As to the bearing of the questions put to the payee, who was then called, there can be no doubt that any one of them might, if answered, have furnished a link in the chain of proof that usurious interest had actually been paid. An agreement to receive it might serve to qualify the subsequent receipt of the money, while the latter might be the consummation of the previous corrupt agreement. The questions had all, in effect, "the same tendency, and come plainly within the cases cited on [*363] the argument. *U. States v. Burr*, 1 vol. of Rob. Report of that case, 207, 208, 242 to 245. *The People v. Mather*, 4 Wendell, 236, 237, 252 to 254. The rule laid down by Marshall, C. J. in the first, and Marcy, J. in the second case, is, that where the court perceive the answer *may tend to criminate* the witness, he should be excused from answering. Several cases illustrating this rule are collected in *Cowen & Hill's Notes to 1 Phil. Ev.* 736 to 738, *id.* 734, 5. The witness called had been *prima facie* an original party to the note, on whom the imputation of usury would necessarily fall. Thus related, it was sought to make him state certain facts which in their very nature and according to the statement of the defendants themselves, tended to make out an usurious agreement. That, by the next step in the proof, might have been connected with his alleged receipt of the money.

Then, if the offence of receiving usurious interest would, in the state of the law at the time when these notes were given subject the witness to a

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penalty, though merely pecuniary, his privilege is not denied. It is clear under the statute of 1837, but that does not apply. By the law as it stood when these notes were executed, the receipt of usurious interest was positively forbidden, by 1 R. S. 760, 2d ed. § 2; and when received, might be recovered back by the payor within one year; and on his default to sue within that time, by an overseer or superintendent of the poor. 1 R. S. 760, 2d ed. § 3, 4. This was either a penalty or it was not. If not, then no penalty was specifically prescribed by the statute, and the offence came within the general provision of the revised statutes, that where no penalty is imposed by a statute which prohibits the doing of an act, it shall be deemed a misdemeanor. 2 R. S. 582, 2d ed. § 45.

It follows that the witness' privilege was properly allowed, and a new trial is therefore denied.

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**HAYDEN and others vs. PALMER and others.*

In a plea of *an insolvent's discharge from imprisonment*, it is enough to give jurisdiction to the officer to allege the presenting of the *petition* and *schedule* required by the act; it is not necessary to state all the facts giving jurisdiction.

Nor is it necessary to aver that the *discharge* was exhibited to the sheriff when the insolvent is on the limits; the provision of the act in this respect applies only where the insolvent is in *close custody*.

A *discharge from imprisonment* is good, as well where there are judgments against the insolvent in actions for *torts* as in actions on *contracts*.

Giving preferences to creditors previous to an assignment under the act, may be urged in opposition to the granting of a *discharge*; but it is no answer to a plea of *discharge*, although it appear on the face of the plea. It will not be regarded as fraudulent *per se* so as to avoid the *discharge*.

DEMURRER to pleas. The plaintiffs declared on a *bond for the liberties* executed by the defendants on the arrest of one *Eli Savage* by the sheriff of the county of Oneida by virtue of a *ca. sa.* at the suit of the plaintiffs for the costs incurred by them in defending against a *mandamus* sued out by Savage. The plaintiffs averred that the *mandamus* was sued out in relation to proceedings had by them as judges of the Oneida C. P. in an action of *trover* in which Savage was a party. The bond was dated 24th March, 1838, and the plaintiffs alleged an *escape* of Savage on 6th December, 1838. The defendant *Palmer* pleaded in his *sixth* plea in bar of a recovery, that on 24th September, 1838, *Savage* being an insolvent debtor residing within the county of Oneida, presented to a supreme court commissioner residing within the same county a *petition* pursuant to the provisions of section one, of article five, of title one, of chapter five, of part second

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of the revised statutes: said article five being entitled “Of Voluntary Assignments by an Insolvent for the purpose of exonerating his person from imprisonment,” and containing such prayer as in and by said first section is described and required; and that on presenting the petition he delivered therewith a *schedule* and *affidavit* conformable in all respects to the provisions of the second section of the said fifth title, and made such proof as by law is required in such case, and in all things complied with the requirements of the statutes of this state touching [*365] such petition and the proceedings to be had on the presenting thereof. The defendant then alleged that such proceedings were thereupon had, that afterwards, to wit, on 6th December, 1838, the commissioner granted a discharge declaring that the person of Eli Savage should forever thereafter be exempted from imprisonment by reason of any debt due, &c. whereupon after the granting of the discharge, Savage went without the liberties as he lawfully might; concluding with a verification and prayer of judgment. The eighth plea of the defendants was similar to the sixth, except that it set forth the proceedings before the commissioner *in hoc verba*. In the *schedule* accompanying the *petition*, John Savage of New-Hartford was set down as a creditor to the amount of \$2438,61, and it was stated that the insolvent had executed to him a deed of all his estate, real and personal, in payment and on account of the indebtedness to John Savage, and as an inducement to him to pay a portion of moneys due to several creditors, whose names and the amounts owing to them respectively were stated. The property transferred was stated to be valued at \$1500, subject, however, to two liens amounting together to upwards of \$1900. The ninth plea of the defendant was like the sixth, except that after setting forth the granting of the discharge, the defendant averred that after the granting thereof and before the commencement of the suit, to wit, on 7th December, 1838, Savage in due form of law produced the discharge to the sheriff of Oneida, whereupon he went without the limits as he lawfully might.

To the sixth and eighth pleas the defendants demurred, assigning as special cause of demurrer that it was not alleged in those pleas that before Savage went at large and escaped, the discharge obtained by him had been exhibited to the sheriff, or that the sheriff had discharged him from imprisonment. There was a separate demurrer to the ninth plea, alleging the same special cause as above, and also that the plea was equivocal and contradictory.

*H. P. Hastings, for the plaintiffs, insisted, 1. That the sixth [*366] plea was defective in not setting forth the substance of the petition, inventory, &c.; and that the averment that the proceedings were in conformity with the statute, presents an issue involving both *law* and *fact*, and therefore is bad; 2. That the sixth and eighth pleas were bad in not al-

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leging that the discharge was *presented* to the sheriff, or that there was *an actual discharge by the sheriff*; 3. That the *eighth* plea was bad also, because on its face it showed that the discharge was obtained in fraud of the statute *by giving preferences*; and 4. That the article of the statute under which the discharge was obtained does not extend to a demand not founded upon *contract*, especially to a judgment for costs only, which is expressly excepted in *article six* of the same act, which is more favorable to the insolvent; and 5. That *article five* does not extend to an actual imprisonment on a judgment in *tort*.

W. Tracy, contra.

By the Court, NELSON, Ch. J. It is objected that the *sixth* plea is defective in not setting forth the substance of the petition and inventory; that the averment of conformity with the act presents a mixed question of law and fact, and is therefore bad. The case of *Service v. Heermance*, 1 Johns. R. 91, and several others that might be referred to, shew that it is not necessary, or even proper, to state the facts giving jurisdiction to the officer with any greater particularity. It would lead to useless and tedious prolixity, and the particular facts are therefore dispensed with.

Although the 11th section of the act, 2 R. S. 788, directs, that if the insolvent be in prison, he shall be discharged therefrom on producing his discharge, it obviously was intended to apply to the case of close custody, and not where the prisoner is at large upon the limits; and besides, it is simply directory. The exemption is complete on the execution of the discharge, except that when in prison on mesne process the prisoner must endorse his appearance, § 10, 11.

[*367] This court has repeatedly held, that a discharge under *this act* extends to debts in judgment, though rendered in actions for *torts*. 4 Cowen, 66. 19 Wendell, 629, 630. *and note.*

The eighth plea, which sets out the proceedings before the commissioner in *haec verba*, contains the inventory of debts, &c. and states that the insolvent, at some time previous, had conveyed all his estate, real and personal, to a person who had assumed the payment of numerous debts, which are specified. The value of the security is stated to be nominal, compared to the debts assumed. This doubtless, afforded ground for resisting the discharge before the officer; but cannot be regarded as fraudulent *per se*, so as to render it void.

None of the several grounds taken to invalidate the pleas can be maintained, and the defendants are therefore entitled to judgment.

Judgment for the defendants.

Albany, October, 1840.—*The People v. Commissioners &c. of Greenbush.*

THE PEOPLE on the relation of James Elliott vs. THE COMMISSIONERS OF HIGHWAYS OF GREENBUSH.

Where application is made to commissioners of highways for the laying out of a *private road*, it is their duty to summon the required number of free-holders to view the land, and not to delegate the authority to another.

Where, however, freeholders were summoned by a *constable*, in compliance with a precept issued by the commissioners, who when assembled were requested by the commissioners to act, and acted accordingly, the court refused to quash the proceedings, it appearing that the party through whose land the road was laid was present and did not object to the proceeding.

COMMON law certiorari. By the return it appeared that *John Hallenbake*, on the 6th December, 1836, applied to the commissioners of highways of the town of Greenbush, to lay out a private road, which for a part of the distance would pass over the lands of the applicant, and for the residue of the distance over the lands of the relator. The relator had due notice of the application, and of the proceedings thereon. The commissioners on the same day issued "a warrant or summons, directed and de- [*368] livered to one of the constables of the town, reciting the application and requiring him to summon twelve disinterested freeholders of the town, and not of kin to the applicant or the relator, to meet, at a specified place, on the 15th day of the same month, to certify on oath to the necessity and propriety of the road applied for. At the specified time and place the constable returned that he had summoned twelve freeholders, giving their names—the freeholders appeared, and were requested by the commissioners to serve as a jury upon the application—they were duly sworn, and after having viewed, &c. they certified in due form that it was necessary and proper to lay out the road. The relator was present, and made no objection to either of the freeholders, nor to the mode of summoning them. The commissioners thereupon proceeded, and laid out the road.

S. Dutcher & I. Harris, for the relator, insisted that the commissioners exceeded their authority in issuing process to a constable to summon the freeholders ; that they should themselves have summoned, or at least designated the freeholders ; and that in consequence of this irregularity the proceedings were void, and the commissioners had no jurisdiction to lay out the road.

S. Cheever, contra.

By the Court, BRONSON, J. The statute provides, that whenever application shall be made to the commissioners of highways for a private road, *they shall summon* twelve disinterested freeholders of the town, to meet on a day certain ; of which day, notice shall be given to the owner or occupant

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of the land through which the road is proposed to be laid out. The freeholders, when met and sworn, are to view the land, and determine whether the road is necessary. 1 R. S. 517, § 77, 78. Although there does not seem to be any very good reason for requiring the commissioners themselves to summon the freeholders, instead of calling in the aid of some [*369] officer who usually performs such services, *yet the law is so written, and it must be obeyed. But there was, I think, a substantial compliance with the requirements of the statute. The freeholders were requested by the commissioners to serve as a jury upon the application. This was a sufficient summoning. The statute does not require the commissioners to issue or have any process—it only requires them to summon the freeholders. The fact that the freeholders had assembled under void process, did not disqualify them for acting when they were afterwards legally requested to do so ; and by requesting them to act, the commissioners signified their approval of the freeholders as fully as they could have done in any other way. The relator had notice, was present, and made no objection. I think the road was well laid out.

Proceedings affirmed.

THE PEOPLE vs. HUBBARD.

A sheriff may be lawfully resisted in carrying away property from a house, the outer door of which being shut, he *opened* for the purpose of entering to make a levy by virtue of an execution against the property of the tenant. The distinction in the books that the sheriff in such case is protected as to the *levy*, but liable as a trespasser for the *entry*, denied.

THE defendant was indicted and tried in the Oneida general sessions for an assault and battery committed on the sheriff of Oneida while engaged in the execution of his office. The sheriff held a *f. fa.* against Schuyler Hubbard and four other persons, which had been issued on a judgment for damages and costs, in an action for a joint *tort*. After having made a levy on the property of Hubbard and the other defendants, to a sufficient amount, the sheriff deemed it his duty as between the defendants to increase his levy upon S. Hubbard, and proceeded to his house for that purpose. S. Hubbard forbade the sheriff entering his house. The door of the house being shut, the sheriff opened it, entered the house, and levied upon a clock, and whilst removing it from the house, S. Hubbard endeavored to prevent [*370] vent him ; and at his request, the defendant, *Russell Hubbard*, a brother of S. Hubbard, came to his assistance, seized the sheriff by the arm, and threw him upon the floor. The sheriff, however, succeeded in carrying off the clock.

Albany, October, 1840.—The People v. Hubbard.

The court charged the jury, among other things, that although the sheriff had no right to enter Hubbard's house as he did, and although Hubbard had a right to put him out, and to command assistance for that purpose, still, if after entering he made a levy, that levy would be valid for his protection, and he had a right to carry out the article levied on ; and the defendant, by S. Hubbard's command, interfered to hinder his so doing, it was the offence charged in the indictment.

The defendant excepted to the charge, and the jury found a verdict of guilty. Whereupon judgment was suspended by the general sessions to obtain the advice of this court, and the indictment and bill of exceptions were accordingly removed here by certiorari.

C. P. Kirkland & J. C. Baker, (district attorney), for the people.

C. Tracy, for the defendant.

By the Court, COWEN, J. It is not at all surprising that the general sessions gave the direction to the jury which was given in this case. The surprise would have been at a direction the other way ; for the English books of practice abound with the distinction, that though the sheriff having a *fieri facias* be a trespasser in breaking the outer door of the debtor's house, yet when he is once in the house, though he entered illegally, and for the purpose of taking the debtor's goods, and though he would be liable to an action of trespass for the entry, yet the levy is lawful. It follows, if that be the law, that though he may be resisted in his entry, and even put out of doors by force, yet if he can seize goods, and escape out of doors with them, it then becomes unlawful for the debtor or his assistants to molest him on account of the goods. There is a *dictum* to this effect which has "come down [*371] to us from the *Year Book*, 18 E. 4, fol. 4, pl. 19, which seems to be the sole foundation of the rule. The case in which it occurs, is thus reported : "Catesby came to the bar, and showed how a *fieri facias* was directed to the sheriff of Middlesex, to cause execution to be made for one J. upon a recovery by the said J. against one B.; and afterwards the said B. put all his goods into a chest, closed and locked ; and afterwards the sheriff broke the [outer] door of the house, and entered into the house and took the goods [away] with him, &c. And whether the sheriff had done any wrong, &c.? Littleton and all his companions held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *fieri facias*; for the *fieri facias* shall not excuse him of the breaking of the house, *but of the taking of the goods only.*" Afterward, in *Semayne's case*, 5 Rep. 93, the court, speaking of 18 E. 4, say, " By Littleton and all his companions it was resolved, that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a

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trespasser by the breaking ; and *yet the execution he then doth in the house is good.* In *Lee v. Gansel*, Cowp. 1, 6, Lord Mansfield speaks of 18 E. 4, as being of an action brought for breaking the outer door, in which the court held the action would lie ; but at the same time held that an action would not lie for taking the goods. He adds : “ I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression ; but to show that the rule of privilege is taken most rigidly.” Much of the reason of Lord Mansfield, in the course of his opinion, goes to countenance the distinction in the Year Book.

Upon such authority, it is not surprising that the distinction should be followed in the books concerning the duties of sheriffs ; and yet I cannot find that the point has ever been adjudged till very lately either one way or the other. Upon the question coming before the supreme court of Massachusetts, in an action against the sheriff for breaking an outer door in the execution of an attachment, it received, as it deserved, much consideration :

[*372] but the sheriff was finally held liable both for the breaking of the house *and the value of the goods taken. Nearly all the cases

bearing upon the point seem to have been cited by counsel, and a learned and elaborate opinion in favor of the plaintiff’s entire claim was delivered by Ch. J. Shaw. That opinion was concurred in by the whole court, *Isley v. Nichols*, 12 Pick. 270. The learned chief justice thought it material, as it certainly was, to ascertain whether the point had ever been adjudged, and he concludes that it had not. There is no pretence for saying that it was involved either in *Semayne’s case*, or in *Lee v. Gansel*. The 18 E. 4, seems to have been spoken of however in both, somewhat ambiguously, not to say as directly involving the question ; and it would be arrogant to deny that *Coke* and *Mansfield* understood the force of cases in the year books much better than any one at this day. I have examined the case, and given nearly a literal translation of it. It is quite obvious that the main stress of the controversy was whether an action would lie for the breaking and entry. Lord Mansfield himself, we have seen, considers the action as one for breaking the outer door. To this particular action the court say, “ The fieri facias shall not excuse him of the breaking of the house ; but of the taking of the goods only. The latter clause contains every word of what the court are represented in the book to have said concerning the taking of the goods. Chief Justice Shaw says, “ On a reference to the case in the Year Book, 18 E. 4, fol. 4, which is usually cited as the foundation of the supposed rule, we think it is quite manifest that the real point decided there was, that a sheriff is not justified in breaking a dwelling house in order to execute a fieri facias, for a fieri facias will not excuse an officer for breaking a dwelling house.” Of course he is clear that the cases in *Coke* and *Cowper* did not turn upon the rule in question. The

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language of the late Ch. J. Parsons to the same effect with the Year Book, in *Widgery v. Haskell*, 5 *Mass. R.* 155, is also mentioned by Chief Justice Shaw as a *dictum* not based upon serious reflection. Finding himself thus entirely unembarrassed by any direct adjudication, he enters into a course of examination in the region of principle, analogy and the decisions in like cases, "through which an attempt to follow him would [*373] be entirely supererogatory. I have adverted to the only authorities which can be relied on as controlling, merely with a view to satisfy myself of their force as positive evidence of the common law. They all go back to the Year Book, in which it is at least very difficult to see that the point arose. All that was said upon it there rather appears to have been a hasty suggestion upon a collateral matter. Lord *Mansfield* is unwilling to admit that he should have so decided; and the report of Lord *Coke* is a mere recital of the case. I think Ch. J. Shaw has satisfactorily shown that here is but a union of mighty names in the extrajudicial assertion of a doctrine which can stand the test neither of principle nor authority. Admitting the distinction to have been directly adjudged in the Year Book and since acquiesced in, there is so much in conflict with it, that we might overrule it without a violation of duty. How would the book then stand upon its face? It admitted what is held by all the other cases, and is undoubted law, that the sheriff had been guilty of a criminal wrong; but asserted that thereby he had acquired a right. It conceded the privilege of protection to the goods, and to the man and his family, yet offered a reward for the violation of that privilege. It legalized resistance against the sheriff's entry even to the shedding of blood; but invited the combat by offering him the spoils within. The law has always proclaimed by a pompous figure that a man's dwelling house is his castle; and promised to defend it as inviolable. The Year Book began in that spirit; but immediately raised a countervailing influence which broke down its own defences. Lord *Mansfield* declared in *Lee v. Gansel*, that the privilege was founded in a sound maxim of policy. But it is, he says, a maxim of political justice, and makes no part of the privilege of the debtor himself, and he then cites the Year Book, to show that it is annexed to the door. In other words, this sound maxim is very little, if any thing, more than a legal abstraction. On reading his whole opinion, it will be found that he was dissatisfied with the privilege itself; but finding it well settled, he construes it in the light of the Year Book, "so very strictly as to leave it no [*374] more than a shadow. In short, if the privilege itself exists, the clause upon which he relied cannot be law. It is idle and absurd to talk of the privilege, unless it be enforced by adequate sanctions.

It is well known that Lord *Mansfield* was no friend to that sort of privilege

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which obstructed the collection of debts. In this he was doubtless right. But he was more legitimately employed as a legislator in the house of lords, where he advocated the bill for curtailing it, than in narrowing it as a judge. Perhaps the privilege now in question should be repealed by the legislature ; but we have no power to repeal it judicially, as I am sure we should virtually do by following the distinction allowed by the court below. We are of opinion that they erred in this respect.

Several other exceptions were taken upon which we felt no doubt, and we should have affirmed the proceeding at once on the close of the argument, had it not been for the question of privilege.

The proceedings are remitted, with directions that the court below proceed to a new trial.

NAZRO & GREEN vs. FULLER & PATTERSON.

An alteration of a promissory note by the *payee* thereof, so as to make it purport to be *payable at a particular place*, vitiates it in the hands of an *endorsee*, so that he cannot recover upon it in an action against the maker. If it be doubtful whether it be an alteration of the note or a mere memorandum by the payee indicating where the demand of payment should be made to charge him as *endorser*, the question, *it seems*, should be submitted to a jury.

THIS was an action of *assumpsit*, tried at the Rensselaer circuit in March, 1839.

The suit was by the plaintiffs as the endorsees of a promissory note against the makers. The note, *as appears from the bill of exceptions*, was in this form :

" \$1000.

Ontario, 28th Jan'y, 1837.

[*375] One year from the first day of May next, we severally and jointly promise to pay Northum & Foot or bearer, "one thousand dollars, for value received, and interest. Payable at Wayne County Bank ;"

Which was signed by the defendants and endorsed by the payees. The defendants offered to prove by one of the payees that after the note was made and delivered to the payees the latter without the knowledge or consent of the makers, added thereto the words "Payable at Wayne County Bank." This evidence was objected to by the counsel for the plaintiffs, and excluded by the judge. The defendants excepted, and thereupon the jury found a verdict for the plaintiffs for the amount of the note and interest. A bill of exceptions was duly tendered and signed, and on it the defendants moved for a new trial.

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S. Stevens, for the defendants, insisted that the alteration of the note purported to make it a part of the contract that it should be paid at the Wayne County Bank; it did not purport to be a mere memorandum in the margin, but to be a part of the note and to form a part of the contract. It was therefore an alteration in a material part of the contract; and an alteration of a contract by a party to be benefitted by it, and who claims to enforce it, renders it wholly void. The evidence offered should therefore have been received.

D. Gardner, for the plaintiffs. The payees added a memorandum, but not over the names of the makers in these words, and in this form, at the left hand of the signatures, "Payable at Wayne County Bank." This did not alter the note, but merely indicated where the endorsers desired a demand to be made for the purpose of charging them. 1. The memorandum of the place of payment was immaterial as to the makers. See *Woolcot v. Van Santford*, 17 Johns. R. 248, 250, 252. This case is approved in *Woodworth v. Bank of America*, and the distinction recognized in Judge Skinner's opinion. 19 Johns. R. 420, 1. This distinction between makers and endorsers on this point is recognized by the supreme court of the United States. See *U. S. Bank v. Smith*, 11 Wheat. 171. 6 Cond.

R. 257. *U. S. Bank v. Bank of Georgia*, 10 Wheat. 333. [*376] An act beneficial to a party does not discharge him. *Mohawk Bank v. Van Horn*, 7 Wendell, 167, 8. 2. As the plaintiffs are bona fide holders, without knowledge of the fact of the addition, they cannot be affected by it. *Stall v. Catskill Bank*, 18 Wendell, 478, 479. *Brockway v. Allen*, 17 id. 43. The holders (plaintiffs) had a right to presume (having no notice) that the makers made the memorandum. 19 Johns. R. 421. *Mills & Spring v. Evans*, 20 Wendell, 251, 259. *Dean v. Hall*, 17 id. 214, 223. *Vallett v. Parker*, 6 id. 615, 620, 621. The last case is expressly in point. 3. An immaterial addition to a note does not vitiate it even in original hands. *Clude v. Small*, 17 Wendell, 238. *Boyd v. Brotherson*, 10 id. 93. Intent dispenses with form. *Douglass v. Wilkinson*, 17 Wendell, 431. A new trial ought not to be granted.

After advisement the following opinions were delivered:

By the CHIEF JUSTICE. If the recovery turns upon the question, whether the addition was made in the margin as a private memorandum, or was intended as an alteration of the body of the note, a new trial must be granted; for upon the case before us the point is equivocal, and should have been put to the jury. The distinction was not taken by the learned judge, and the ruling seems to go the length of sustaining the action in either aspect.

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I was at first inclined to think the addition, even if regarded as annexed to the body of the note, was not such a material alteration as would invalidate it, for the reason that the designation of the *place* of payment did not affect the rights of the makers. It has been fully settled in this court, that, notwithstanding the *place* is thus fixed, the maker is generally and universally liable, and a demand at the *place* is not a condition precedent of payment. 17 *Johns. R.* 248. 8 *Cowen*, 271. 3 *Wendell*, 13. The action may be sustained the same as upon a note payable generally. The only difference between the two cases is, that in the one the maker [*377] may plead a tender at the place, which would bar damages and costs. Being thus generally liable, it appeared to me that the right to discharge the obligation should be as broad, and that a tender might also be made to the person the same as if no place had been fixed; that it was inconsistent and unreasonable to subject the party, as upon a note payable generally, and not allow him to discharge it as standing upon that footing; and if so, the designation of the place would not at all prejudice his rights. I admit if it fixes the payment by the maker to the place, the addition is material, and must be fatal when made out: for then it changes the place and mode of payment, and may operate injuriously. If he still could pay to the holder, as well as at the place, then the change would be rather beneficial than otherwise; because it would give the alternative.

But upon further consideration, I am inclined to think when the courts use the language that the note is payable generally and universally, though the place of payment be fixed, they only mean to say that it is so to be regarded for the purposes of the remedy, and that payment must still be made at the place; and a tender elsewhere is no bar. I have found no authority beyond this; and on speaking of the right of discharge by *tender*, the language used limits it to the place designated. There are some authorities also which confirm this view. In *Cowie v. Halsall*, 4 *Barn. & Ald.* 197, the acceptance was general, and the drawer without the consent of the acceptor added, "payable at Mrs. B's, Chiswell street"—the court held the alteration material, and discharged the acceptor. It should be remarked, however, that this case is not an authority in point, because at that time a special acceptance in England was material, and the holder was bound to prove presentment at the place, to charge even the acceptor. That question had been settled the year before in the famous case of *Row v. Young*, 2 *Ball. & Beat.* 165. But this latter case produced a change of the law by act of parliament, 1 and 2 *Geo. 4 ch. 78*, by which it is declared, that an acceptance, payable at a particular place, is a general acceptance, unless [*378] expressed to be payable there only. The question decided in *Cowie v. Halsall*, came up again (after the act) in *M'Intosh v. Haydon*, 1 *Ry. & Mood.* 362. The counsel for the plaintiff took distinctly

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the ground, that since the act the addition was immaterial, the situation of the acceptor being the same as in case of a general acceptance, and that the party could not be prejudiced. Abbott, Ch. J. conceded upon this view that the alteration was not so material as to vitiate the bill; but there was another view of the question, he observed, in which the words added, materially alter the character of it, namely, that an endorsee might charge an endorser by shewing presentment at the particular place, when in truth the acceptor would not be in fault, he never having undertaken to pay there. The doctrine has since been recognized in *Taylor v. Moseley*, 6 Carr. & Payne, 273, though questioned by the counsel. It is perhaps, sound, upon the ground, that *any material alteration* vitiates the instrument, though it may not be prejudicial to a particular party. See also *Chitty on Bills*, 100, 103. *Byles on Bills*, 173, 177. The maker of a promissory note stands upon the footing of an acceptor, and if the alteration of his contract in the respect mentioned is a material one, and would vitiate the bill, it would likewise vitiate the note. All the reasons that exist in the one case are fully applicable to the other.

I am of opinion therefore that a new trial must be granted.

By COWEN, J. That the addition of a place of payment, made after an endorsement without the assent of the *endorser*, will discharge him, was settled by *Woodworth v. The Bank of America*, 19 Johns. R. 391, 418 to 422. But it is thought it has not the same effect as to the *maker*, because he is liable generally and universally on a special promise to pay at a particular place, as if none had been mentioned. To say that where a man contracts to pay at a particular place, he is under no obligation to regard that place, is certainly, it seems to me, going very far towards framing a new contract for the parties. But take it to be no more than a general promise to pay without place, it then stands on the "footing of a bill accepted payable at a particular place, since the statute 1 and 2 Geo. IV. This expressly declares such an acceptance not special but general. *Vid. Chit. on Bills*, 172, Am. ed. of 1839. Yet all the authorities since that statute concur, that inserting a place of payment without the acceptor's consent discharges him. *Id.* 204. The following cases are directly in point: *M'Intosh v. Hayden, Ry. & Mood. N. P. Cas.* 362, before Abbott, Ch. J.; *Taylor v. Moseley*, 6 Carr. & Payne, 273, before Lord Lyndhurst, Ch. B.; *Desbrow v. Wetherby*, *id.* 758, before Tindal, Ch. J.; 1 Mood. & Robins, 438, S. C., by the title of *Desbrowe v. Wetherby*; *Sparkes v. Spur, Chit. Stamp Laws*, 26, note; *Chit. on Bills*, 204, ed. before cited, note (a.) This case was first heard before Abbott, Ch. J., who nonsuited the plaintiff on the ground of the alteration. A motion being made to set aside the nonsuit, all the judges were against the motion on the

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merits, but they finally granted it on terms for the purpose of having the question put upon the record. In the course of these cases the learned judges pointed out various ways in which the alteration might prejudice the acceptor, which it is unnecessary to go over; for the weight of authority seems to be decisive.

I am in favor of a new trial.

New trial granted.

HIGGINS *vs.* WHITNEY.

Where property tortiously taken by one person from the possession of another is subsequently levied upon whilst in the hands of the tort-feazor by a *third person*, under a warrant of distress for rent due by the owner, such last taking may be shewn in *mitigation of damages*, in an action by the owner against the tort-feazor, if the latter took the property under an honest belief that he had title to it, and not for the purpose of subjecting it to the landlord's warrant.

CERTIORARI to the municipal court of Brooklyn. *Whitney* sued *Higgins* in the court below in trespass, for breaking and entering his house, and taking and carrying away a carpet, bureau, and other goods and [*380] chattels of the plaintiff. "On the trial, the defendant attempted to justify under an assignment of the property to him by the plaintiff; but the assignment was rejected, on a ground which need not be noticed. The defendant then offered to prove, in mitigation of damages, that the goods had subsequently been taken out of his custody by virtue of a landlord's warrant, to pay the rent of the plaintiff. This evidence was rejected by the court, and the defendant excepted. Verdict and judgment for the plaintiff.

A. J. Spooner, for plaintiff in error.

N. B. Morse & J. P. Rolfe, for defendant in error.

By the Court, BRONSON, J. When property has been tortiously taken, the owner is not only entitled to an action, but to full compensation in damages; and he can neither be deprived of the one nor the other by *any mere act of the wrong-doer*, as by an unaccepted offer to return the property, or causing it to be subsequently taken on legal process *in his own favor* against the owner. *Hanmer v. Wilsey*, 17 *Wendell*, 91. *Otis v. Jones*, 21 *id.* 394. In the last case I remarked, that had there been a sale before suit brought, on legal process against the owner *in favor of some person other than the wrong-doer*, that would have presented a question which we were not then called upon to decide. That question is now before us; and I

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think the evidence offered should have been received in mitigation of the damages. Although the assignment was rejected by the court below—it is evident that the defendant took the property under the honest belief that he had a title to it. It was not a wanton trespass, nor was the property removed for the purpose of subjecting it to the landlord's warrant. Without any agency on his part, the property has since been taken from the defendant by legal process, and applied to the plaintiff's use, by paying the debt which he owed to a third person.

There is, I think, a difference in principle between the *cases on [*381] which the plaintiff relies, and the one at bar. One who has wrongfully taken property cannot mitigate damages by showing that *he has himself* applied the property to the owner's use without his consent. But when the property has been so applied, *by the act of a third person and the operation of law*, that fact should be taken into the account in estimating the plaintiff's damages.

Judgment reversed.

FAIRCHILD & BACON vs. CASE, late sheriff of Oswego.

In an action against a sheriff for the *escape* of a prisoner, he cannot object as a bar to the recovery, that the plaintiffs in the original action declared against the defendant *generally* as in custody, instead of declaring *specially* that he was in *close custody*.

The act for *more easy pleading in certain suits*, does not extend to cases of *non-feazance* by public officers ; a sheriff sued for a *negligent escape* cannot therefore avail himself of the *statute of limitations* without pleading it. Even when sued for a *voluntary escape*, whether the sheriff can avail himself of the *statute of limitations* without pleading it, *quere*.

A new trial will not be granted, because the judge refused to permit a question to be put to a witness in this form : "By what means and in what manner did the prisoner break jail?" on account of the generality of the question. To entitle a party to such an inquiry, he should apprise the judge of his intention to show such a state of facts as would *excuse* the sheriff.

Nothing but the act of God, or of the enemies of the country, will excuse the sheriff.

General reputation of the insolvency of the prisoner, is inadmissible in an action against the sheriff for an escape.

THIS was an *action on the case* tried at the Oswego circuit, in June, 1839, before the Hon. PHILo GRIDLEY, one of the circuit judges.

The plaintiffs declared for the voluntary escape of one Gerlack, from confinement in the jail of Oswego, on an arrest in an action of assumpsit, at the suit of the plaintiffs by virtue of a *capias ad respondendum*. The plaintiffs proved the *capias* with a return by the defendant of *cepi corpus in custodia*. They also produced an exemplification of the judgment against Gerlack, from which it appeared that the *plaintiffs [*382] in the action against him, declared against him *generally, as in*

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custody of the sheriff of the county of Oswego, and that judgment was rendered against him for \$2044,44; the plaintiffs then proved a *negligent escape* of Gerlack. Evidence was given on both sides upon the question whether Gerlack was, at the time, liable to arrest as a *non resident* of the state; and also on the question of his ability to pay the debt. The jury found a verdict for the plaintiffs, with \$2304,39 damages, and six cents costs.

The defendant's counsel, on a case made, moved for a *new trial*.

B. Davis Noxon, for the defendant, insisted on the following points among others: 1. That the evidence did not show that Gerlack was liable to arrest. 2. That the plaintiffs, by declaring *in chief* against Gerlack and proceeding to judgment, had thereby discharged the defendant in this cause from all liability, by reason of his return of *cepi corpus in custodia*. 3. That the suit was not commenced within a year after the escape; and this defence was available under the general issue, yet the judge held the statute of limitations must be pleaded. 4. That a question to a witness, "by what means and in what manner did Gerlack break jail?" was overruled. 5. That general reputation that Gerlack was insolvent was rejected by the judge. 6. That the judge charged that the rule laid down in *Huffman v. Hulbert*, 13 Wendell, 377, was inapplicable in this cause.

By the Court, COWEN, J. 1. All the questions of fact in this case, properly belonging to the jury, were submitted to and disposed of by them; and among these was the question of Gerlack's non-residence and consequent liability to arrest and imprisonment.

2. If the form of declaring had entitled Gerlack to a discharge, he alone could take advantage of the slip—not the sheriff.

3. The statute concerning venues, and for *more easy pleading* in certain suits, 2 R. S. 277, 2d ed. § 28, 29, is in terms confined to *acts* [*383] *done by officers virtute officii*; and "does not extend to mere non-feasance, such as a negligent escape. *Elliot v. Cronk's adm'res*, 13 Wendell, 35. *Hopkins v. Haywood*, id. 265. The statute of limitations should therefore have been pleaded. Independently of the statute for *more easy pleading*, the form by which a sheriff or other officer must avail himself of the statute limiting actions for escapes, is the same as in other actions. *Vid. 2 R. S. 224, 2d ed.*

It was said the declaration is for a *voluntary escape*, which implies a positive act of the sheriff. Without deciding whether he might, in such a case, avail himself of the limitation without plea, it is sufficient to say that the declaration was in effect also for a *negligent escape*. This may always be proved, and in fact was so here, under a count for a *voluntary escape*.

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Where two matters may be given in evidence under the same count, one requiring a defence to be pleaded and the other not, there can be no doubt that the defendant must plead, or he will lose his right of defence as to the former. It is by no means clear, however, that you are not obliged to plead the limitation in answer to a voluntary escape.

4. The question put and overruled, as to the means or manner of escape, is not shown to have been relevant. It might have been answered by saying that the escape was effected by means and in a manner which took from the charge of negligence in the sheriff, without showing any real excuse, as that it was by the act of God, or the enemies of the country. The latter seem to be the only excuses as to manner and means which the sheriff can set up. He stands in this respect on the same ground with a common carrier. That may be seen by 1 *Rolle's Abr. tit. Escape*, D. pl. 5, 6, 7, p. 808. It is said in several books, citing *Rolle*, that the sheriff would be excused by a sudden fire. But *Rolle* puts it on the ground that the fire is kindled by the act of God. In *Green v. Hern*, 2 *Penn. R.* 167, 169, Gibson, Ch. J. says, that according to the common law since the day of *Rolle's Abridgement*, the jailer can avail himself of nothing as matter of defence, but an act of God or the common enemy. The same rule was stated by him in *Wheeler v. Hambright*, 6 *Serg. & Rawle*, 390, 396. *He there says the liability of a sheriff is, in this respect, [*384] like that of a common carrier. See also *Sleemaker v. Marriott*, 5 *Gill. & Johns.* 406, 410. To warrant the question, counsel should at least have apprized the judge of his object, and shown that the means and manner inquired for were such as the sheriff might lawfully allege in his excuse.

5. It is not necessary to say that common reputation as to the state of a man's property, and whether he be solvent or not, should in all cases be excluded. In behalf of a prisoner indicted, and on trial for passing counterfeit bills, the reputation of his neighborhood was held receivable by the supreme court of North Carolina, to show that he was a moneyed man. *The State v. Cochran*, 2 *Dev.* 63. Here it was offered in behalf of a prisoner in close custody for debt, to prove that he was insolvent. It is quite obvious what the answer would always be under such circumstances; and yet how fallible, as the ground of conclusion by a jury. It would seem at all times to come within the spirit of the rule which rejects hearsay evidence to support a particular fact; and when offered in connection with circumstances directly calculated to establish insolvency of themselves, and raise a general rumor of it in the neighborhood, reputation would be, at best, but a very poor item of proof. Suppose a merchant to sue for words charging him with bankruptcy, was it ever thought the defendant could aid his plea of truth in justification, by proving the plaintiff to be a reputed bankrupt?

6. The rule of *Huffman v. Hulbert*, 13 *Wendell*, 377, which the judge

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refused to apply, was this: A request made by a surety to the creditor that he should sue the principal, and a refusal, will not discharge the surety, though the principal finally turn out to be insolvent, unless it be made clear by proof that he was solvent at the time of the request, and the debt lost by the delay. It is barely necessary to state the point resolved in that case to see that the judge was right here.

There is no reason for interfering on the ground that the damages found by the jury were excessive.

New trial denied.

[*385] *BLOODGOOD *vs.* FAXON & BARNES, impleaded, &c.

In a joint action against the maker and endorser of a promissory note, which by the evidence of the maker, called as a witness for the endorser, is proved to be usurious, the plaintiff, although he cannot recover against both defendants, is entitled to a verdict against the maker whose evidence cannot benefit himself.

Nor can he recover against *both defendants*, or *either* of them, where the declaration contains only the *money counts*, upon a promissory note, the consideration of the usurious note, where one of the defendants is maker and the other endorser of the former note, if a copy of such former note be not appended to the declaration.

THIS was an action of *assumpsit*, tried at the Erie circuit in July, 1839, before the Hon. NATHAN DAYTON, one of the circuit judges.

The suit was commenced against C. Faxon, R. T. Kelly and J. Barnes. The declaration not having been served on *Kelly*, the plaintiff elected to sever the suit and to proceed against *Faxon* and *Barnes* alone. The declaration contained only the money counts, but appended to it was the copy of a promissory note bearing date 21st February, 1837, made by *Faxon*, for \$871,03, payable three months after date to the order of *Kelly*, at the Mechanic's and Farmers' Bank, Albany. On the trial of the cause the note, of which a copy was given, was produced. It was signed by *Faxon* as maker, and endorsed by *Kelly* and by *Barnes*, and at maturity was protested for non-payment and notice of protest given. On the part of the defence it was proved that the note produced was given in renewal of a former note, dated 19th November, 1836, for the same amount, made by *Faxon* and endorsed by *Kelly* and *Barnes*. *Faxon*, called as a witness for *Barnes*, proved that the note of 21st February was accepted by the plaintiff on an *usurious consideration*. The plaintiff requested the judge to charge the jury, that though they should be of opinion that the note of 21st February was usurious, still the plaintiff was entitled to recover against *Faxon* and *Barnes* the amount of

[*386] the note of 19th November, which was given on a good consideration, and "that at all events he was entitled to recover on such note against *Faxon*, the mager thereof. The judge ruled that

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the plaintiff was not entitled to recover against either of the defendants on that note. To which decision the plaintiff excepted. The jury found a verdict for the defendants. The plaintiff moved for a new trial.

J. Van Buren, for the plaintiff

, for the defendants.

By the Court, NELSON, Ch. J. The learned judge was right in refusing a recovery against either of the defendants on the note of 19th November.

Under the statute allowing a joint suit against the maker and endorser, the recovery may be joint, or several, but in either case it must be confined to the bill of exchange or note of which a copy was given with the declaration. The suit is a creature of the statute, which expressly restricts the proceedings to such instrument. 2 R. S. 274, § 6, 7. Without it, the plaintiff would be bound to prove a joint indebtedness against all the defendants. He must recover against all or none. The act has qualified this rule in suits against maker and endorser, but only in cases where that relation exists between the defendants in respect to the subject matter of the suit, and a copy of the instrument given. Beyond such a case the plaintiff cannot sever the defendants. He would conflict with the familiar rule above stated.

I agree, he may recover against all independently of the statute, upon his common counts, if he prove a *joint indebtedness*. But he must stand upon the statute if he expects to succeed only against a part of the defendants.

In this case, however, the judge should have directed a verdict against Faxon. There was no valid defence to the note declared on as to him. He proved the usury as a witness for Barnes. His testimony cannot benefit himself.

New trial granted as to Faxon; costs to abide the event.

*THE BOARD OF SUPERVISORS OF THE COUNTY OF DUTCHESS [*387]
vs. SISSON.

Where a road was laid out through the lands of an inhabitant of a town, and the supervisors of the county made out a tax list and warrant so as to collect the sum allowed as damages to the owner, and to have the same paid over to him, and subsequently altered the warrant, directing the collector to pay over the amount allowed to the supervisor of the town instead of to the commissioners of highways, and the money was paid over to the supervisor; and at the next annual meeting of the supervisors they directed the supervisor to whom the money was paid to pay over a portion of it to the owner of the land, and the residue to the county treasurer to the credit of the town in which the money was collected, and instead of comply-

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ing with such order, the supervisor paid over the whole sum to the owner of the land *it was held*, that an action for money had and received did not lie against the supervisor, at the suit of the *supervisors of the county*.

DEMURRER to replication. The facts of this case, and the question arising thereupon, are fully stated in the opinion delivered by Mr. Justice BRONSON. The case was submitted on written arguments by

E. M. Swift, for the defendant.

D. V. N. Radcliff & U. Cole, for the plaintiffs.

By the Court, BRONSON, J. It would be useless to follow the counsel through a critical examination of these pleadings, when we are perfectly satisfied that the action cannot be maintained. The case is substantially as follows: In July, 1836, a highway was laid out through the improved lands of one *Israel Wilbur*, in the town of *Washington*, Dutchess county; and in September following his damages were assessed by a jury at \$2000. The proceedings were laid before the board of supervisors at their annual meeting in November following, when they reduced the damages to \$1750, and made out the tax list and warrant so as to collect that sum in the town of *Washington*, to be paid to *Wilbur* for his damages. The board then adjourned over until December, when objections were made that [*388] *Wilbur* was allowed *too large a sum, and the board passed a resolution to re-consider the allowance, and postpone the further consideration of the matter until their next annual meeting in November, 1837. They altered the warrant which had previously been made out for collecting the taxes in *Washington*, so as to direct the collector to pay over the \$1750, to the defendant who was the *supervisor* of that town, instead of paying it to the commissioners of highways of the town, as had been previously ordered. This was done, as the board say, to the end that the money might be put at interest by the supervisor, to await the final decision of the board the next year.

The money was collected, and in February, 1837, the town collector paid it over to the supervisor, the defendant. *Wilbur* demanded his money, and obtained a *mandamus* against the supervisor, requiring him to pay it over; and in that proceeding an issue was joined.

The board of supervisors at their annual meeting in November, 1837, resumed the consideration of the matter, and finally reduced the damages to \$750, to which interest was to be added; and passed a resolution that the supervisor pay over that sum with interest to *Wilbur*, and that he pay the balance of the \$1750 to the *county treasurer*, to the credit of the town of *Washington*.

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At the annual town meeting in Washington, in April, 1838, the supervisor laid the matter before the electors, and they voted that *the whole* of the money should be paid over to *Wilbur*; and the supervisor thereupon paid it accordingly.

In October following, the board of supervisors brought this action of assumpsit, to recover from the defendant *the balance*—nearly \$1000—which they say should not have been paid to *Wilbur*.

It may be considered for all the purposes of this case, that the board had a right to re-consider, in December, what had been done at its previous meeting in November, 1836. Still, the board did not in fact wholly revoke its doings. The tax list of the town of Washington was left, as it had been previously made out, so as to levy the whole *\$1750 [*389] for *Wilbur's* damages. The only alteration made, was a direction to the town collector to pay the money to the supervisor, instead of the commissioners of highways. The whole was in fact collected, and has been paid over to *Wilbur*.

I think it quite clear, that the balance which the plaintiffs seek to recover, belongs, either *first*, to *Wilbur*, who has got it; *second*, to the town of *Washington*, in its corporate capacity; or *third*, to the *tax payers* of that town, from whom the money was collected. And, at any rate, it does not belong to the plaintiffs.

This was an action for *money had and received to the plaintiff's use*, and they must show a title to it. It is not enough to show that the defendant has no title. He is answerable to the true owner, and to him only. Now the plaintiffs do not pretend that this is their money, nor the money of the county of Dutchess, which for certain purposes they represent. But they seek to recover the money, *to the end that they may give the town of Washington credit for it*. If the town of Washington owes the money, and is not, as it seems to be, satisfied with what has been done, let the town sue for the money.

It is impossible to maintain this action.

Judgment for Defendant.

PHILLIPS and others vs. Cook.

On an execution against *one of two partners*, the sheriff may *seize the entire partnership effects*, or so much thereof as may be necessary to satisfy the execution, and sell *the interest of the partner* against whom the execution is issued; and *an action of trespass* will not lie against the sheriff at the suit of the *other partner* or *his assignees* for delivering to the purchaser the property sold.

The purchaser, in such case, becomes a tenant in common with the other partner, and if he

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purchase with notice that the goods are partnership effects, takes *subject to an account* between the partners, and to the *equitable claims* of the *creditors of the firm* in the name of the other partner.

It seems that the sheriff may, against the will of the other partner, *deliver the property sold* to the purchaser.

[*390] **It seems* the court of chancery is the appropriate *forum* to be resorted to by the solvent partner, or by the creditors of the firm against the purchaser for the enforcement of the lien, although *courts of law* in the exercise of their *equitable powers* have sometimes interfered for the protection of the solvent partner or the creditors of the firm. The cases upon the subject adverted to, and commented upon, and the conclusion arrived at, that neither a court of equity or law have the power to stay an execution until an account be taken.

It seems the proceeds of the sale *must be paid over* to the execution creditor, and the recourse of the solvent partner or the creditors of the firm is against the property in the hands of the purchaser.

THIS was an action of *trespass de bonis asportatis*, tried at the Onondaga circuit in September, 1837, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The plaintiffs made title to the property in question under an assignment *for the benefit of creditors*, executed to them by Mrs. A. Ruoul, a member of the firm of A. Damaus & Co. composed of herself and A. Damaus. The assignment was executed in the evening of the *eighth* day of December, 1836. The business of the firm was that of druggists and booksellers, and by the assignment executed by Mrs. Ruoul, *in the name of the firm*, all the goods, books, stationery, drugs, medicines, and all other property in the store occupied by the firm in the village of Syracuse, was transferred to the plaintiffs. The firm at the time was *insolvent*. The property assigned amounted to nearly \$5000. On the 9th December the plaintiffs took possession of the property and commenced the disposition thereof at private sale and at auction, and continued to do so until 30th January, 1837, when the defendant, as a deputy of the sheriff of the county of Onondaga, took and sold goods of the value of \$536,56, and delivered the same to the purchasers. The defendant sold the goods by virtue of an execution against A. Damaus, one of the members of the firm of A. Damaus & Co. who absconded about the first day of November, 1836. The defendant, as deputy sheriff, received the execution on the *seventh* day of December, 1836, and on the next day *in the morning* levied upon the goods in the store then occupied by the firm of A. Damaus & Co. All, however, that he did as to the levy was to go into the store and see the goods. The execution [391] was for \$410. The counsel for the defendant insisted that the assignment was void as against a creditor who had caused a *levy* to be made upon the individual interest of one of the partners by virtue of an execution, and at all events that *trespass* would not lie. The judge charged the jury that the assignment was valid, and that the defendant was

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not in a situation to question it ; that *trespass* was the proper action, and that the plaintiffs were entitled to recover. The defendant excepted to the charge, and the jury found a verdict for the plaintiffs for \$536,56. The defendant asks for a new trial.

B Davis Noxon, for the defendant, insisted upon the following points :

1. The defendant being a deputy sheriff and having an execution in his hands against Alfred Damaus, one of the firm of A. Damaus & Co. had a right to levy the same upon the interest of Damaus in the goods of the firm, although in the actual possession of Mrs. Ruoul the other partner.

2. A levy by a sheriff on goods under such circumstances is good, although the sheriff does not remove or lock up the goods, or in any way dispossess the other partner.

3. The sheriff having once levied would not commit a trespass by selling the goods in pursuance of such levy ; if any trespass was committed it was by the levy and not by the sale, and the levy having been made before the assignment, the plaintiffs can have no greater rights than A. Damaus & Co. had before the assignment, and therefore cannot in any event maintain trespass. If any action at law could be maintained by the assignees, it is an action of trover after a demand and refusal.

4. The assignment being made by one partner of the firm in the name of the firm to trustees for the benefit of certain preferred creditors, and without the consent of the other partner, is not within the ordinary business of the partnership, and therefore not binding on the other partner, and void.

5. The sheriff, by virtue of his execution and levy, succeeded to the rights and interest of Damaus in the "partnership property," [*392] and therefore stands in a situation to question the validity of any assignment made by the firm or by Mrs. Ruoul, in the name of the firm.

6. The assignees cannot maintain any action at law ; their only remedy, if any, is in equity.

7. If the sheriff sold more than the interest of Damaus in the goods, to wit, the whole of the goods, and he had no such authority, but might sell the interest of Damaus, then he exceeded his authority, and the purchaser neither gained nor did Mrs. Ruoul lose any thing.

J. Wilkinson, for the plaintiffs, insisted upon the following points :

1. The assignment of the goods of the firm of A. Damaus & Co. made after Damaus had absconded, was good. *Angel on Assignments*, 49.

6. The possession of the plaintiffs was sufficient to sustain the action against any one other than a creditor of the firm. 11 *Wendell*, 54.

3. There was no actual levy. The sheriff never took any possession of the goods until near two months after the plaintiffs had been in possession.

4. This was the partnership property of the firm of A. Damaus & Co. and

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an execution against one partner would not justify the sheriff in selling the property of the firm. 1 *Wendell*, 311. 2 *Eng. Ch. R.* 189.

By the Court, COWEN, J. A point is now made on the validity of the levy; but it was not raised at the trial: and the only question is whether *trespass* will lie against the sheriff for seizing and selling under a *f. fa.* the property of an insolvent firm, to satisfy the individual debt of one of the members. The action here is the same as if it had been brought by the partners, it being by trustees, claiming under an assignment made subsequent to the levy. The question has been a good deal discussed before us in consequence of some apparent conflict in the cases, and a difficulty upon them, felt more by the other members of the court than by myself. For [*393.] one I never could bring myself to doubt a **priori*; nor have I been able to see any serious discrepancy in the adjudications. Not a single direct authority has been shown for maintaining this action; nor any intimation to that effect, although the question stood over in *Tharber v. Lewis*, for several terms, under directions to re-argue.* The whole doctrine is gone into a distinct section of *Collyer on Partnership*, 473, to 478, *Am. ed.* of 1839, where several of the most material cases, English and American, are cited. The result is, that at law, the sheriff may *seize* and *sell* the interest of a partner in all choses in possession, the same as he may that of any joint tenant, or tenant in common. Partners are joint tenants in the stock and all the effects; they are seized *per mi et per tout*. *Collyer*, 64. And the rule of proceeding expressly laid down in the books is, that, under a *f. fa.* against one, the sheriff must seize the entire partnership effects, so far as may be necessary to satisfy the execution; he must sell that partner's share against whom the execution is; and then the vendee becomes tenant in common with the other partner. *Backhurst v. Clinkard*, 1 *Shower*, 169. *Holt*, 643, *S. C. Heyden v. Haydon*, 1 *Salk.* 392. The doctrine of these cases has never been doubted; but has been as often reaffirmed as the question has been mentioned by courts or in any of the *Treatises on Partnership*. It was adjudged in *Jacky v. Butler*, 2 *Ld. Raym.* 871, and in *Marriott v. Shaw*, *Com. Rep.* 275, 277. The true rule was laid down by Holt, Ch. J., in *Pope v. Haman*, *Comb.* 217: "Upon a judgment against one partner, the sheriff may take the goods of both in execution; and the other co-partner hath no remedy at law, otherwise than by retaking the goods, if he can; for the vendee of the sheriff becomes tenant in common with the other co-partner." This is but saying what every one would, who has studied the text of Littleton, *Co. Litt.* § 323, [*394] 199, b. So far as this section and Coke's Commentary pertain *to the question, they are both adopted in *St. John v. Standring*, 2 *Johns. R.* 468.

* The re-argument in *Lewis v. Thurber*, was had at the last *July term*, but was not decided until *January term*, 1841. It will appear among the cases of the latter term.

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It does not appear to have been doubted in any age of the law, that the sheriff might take and sell the separate partner's interest. The questions have been whether he might not sell the whole interest of both, on a *fi. fa.* against one ; or whether he could seize the whole. The answers in all the cases have been, you must seize the whole, and sell only the moiety belonging to the debtor. These were called old cases on the argument ; the antiquity of those cases only adds to their strength. They are all, however, since the revolution of 1688, ranging from Wm. and Mary down to the Georges. They were cited and approved by Lord Kenyon, in *Smith v. Stokes*, 1 *East*, 363, 367. More than that, they were expressly affirmed by a decision of this court, *Schrugham v. Carter*, 12 *Wendell*, 131. The entire partnership property was there taken under an execution against one, and this court held that *replevin* would not lie by the assignees of the firm. Savage, Ch. J., laid down the law as it was understood by Holt, Ch. J., in the reign of William and Mary.

It was admitted in argument that the sheriff may seize, but it was said that neither he nor the purchaser can remove the property. Whereas the cases at law are all express that he may sell, from *Holt* down to the 12 *Wendell*. The distinction sounds singular on its face. For what purpose does a sheriff seize property on a *fi. fa.* if not to remove and sell it ? But his power was assailed *a priori*, and it was said he can exercise no greater power over the property than the copartner against whom the execution goes ; that by the levy, the sheriff is but a tenant in common, who must wait his chance, and take the goods when he can ; but he cannot remove them if his co-tenant be unwilling and hold on to the possession, without committing a breach of the peace. If this were so, the reason would be a perfect *non sequitur* as to the right of suing in trespass *de bonis*, trover or replevin, however it might entitle the co-tenant to sue for an assault in wresting the property from him. *Hyatt v. Wood*, 4 *Johns. R.* 150, 159, 160. But is the law "so absurd as to command a sheriff by its [*395] writ to seize and sell an article, yet forbid him to remove it, or declare him a breaker of the peace for selling it, because he resisted, and put to the exercise of force ? This is a sort of imbecility which the common law has been careful to avoid in all cases. When it directly commands an officer to do any act, it impliedly gives him the power and means of performing it, and in nothing is this rule more conspicuous than in the execution of a sheriff's power. But it cannot be necessary to pursue the question through a course of reasoning, for the sheriff's right at law is settled by the authority of this court. *Wilson & Gibbs v. Conine*, 2 *Johns. R.* 280, is not opposed to it. There both the partners sued in *trover* for a seizure upon execution against one ; but they recovered merely because the defendant failed in his formal proof of the decree on which the execution issu-

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ed. On motion for a new trial, the preference of partnership creditors was recognized, on the ground, as expressly stated, that the motion appealed to the equity of the court. They did not pretend to deny the sheriff's legal right, though he had seized and sold a consumable article, after being forbidden by the plaintiff, and the purchaser had actually taken it away. No one even hinted that the sheriff wanted the legal power, provided his authority had been shown. *Vide per Kent, Ch. J. at p. 282.* There are, I concede, some respectable *dicta* which favor an action at law by the partner who has been thus dispossessed: the action being in his name alone. Such is that of Putnam, J. in *Rice v. Austin*, 17 Mass. R. 206, 7, and Parker, J. in *Gibson v. Stevens*, 7 N. H. Rep. 357, 8. Putnam, J. cited no authority, and professedly spoke hypothetically. The point was not raised and finally decided in either of the cases; and Parker, J. admitted himself to be speaking on a difficult branch of the law. I have looked into the three cases cited by him. Two of them avowedly go on the ground of equity—impliedly therefore admitted the law to be different from what the learned judge understood it to be. The third was a case of tenants in common, the sheriff having expressly sold the whole under an execution against

[*396] one. *Melville v. Brown*, 15 Mass. Rep. 82. *Vide White v.*

Osborn, 21 Wendell, 72, S. P. as to a sale of the whole by one of two tenants in common. It would be different, even in such a case, should the sheriff sell only the proper share, though he seized the whole, as he must. Clearly it cannot be denied that a copartner has as great an interest at law, and even a greater than a simple tenant in common, nor that if the sheriff can on a *fi. fa.* against one of several tenants in common, take the whole chattel and sell the moiety in despite of opposition from the co-tenant, he may do so as against the co-partner. That he may do it in the former case was directly held in *Messereau v. Norton*, 15 Johns. R. 179. He had, under an attachment against one tenant in common, seized and taken a yoke of oxen from the actual possession of the other, and proceeded to sell them; and they were taken away by the purchaser, though the co-tenant forbade the sale. He brought trespass; but this court held it would not lie, citing as authority the very case of *Heydon v. Heydon*, respecting the sheriff's authority against one of several partners. In *Shaver v. White*, 6 Munf. 110, the attachment was sued out against one of two partners, and 300 head of cattle taken by the sheriff out of the possession of both; and they both brought trespass for the taking. The action was against the plaintiff in the attachment who directed the sheriff to levy. The court held that the action would not lie, and pronounced their opinion, also, that it could not be maintained against the sheriff, citing *Heydon v. Heydon*. The argument for such an action goes the length of saying that when a man puts his property into partnership, it is absolutely protected against a levy at the suit of

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his individual creditors ; that it is exempt from execution like his ten sheep or his cow under the statute. A debtor has but to form a partnership, and he may set executions at defiance so far as his own debts are concerned, still possessing and trading upon that very capital contributed by his individual creditors. It was thought singular by a learned judge in Pennsylvania, that even the qualified exemption allowed in such a case by a court of chancery should not have been repudiated as contrary to the statute against transfers to defraud creditors. He said, “that a *contract [*397] which enables the parties to keep a class of their creditors at bay, and yet retain the *indicia* of ownership, should not have been deemed within the statute of Elizabeth, is attributable exclusively to the disposition universally manifested by the courts of justice to encourage trade.” *Gibson, Ch. J. in Doner v. Stauffer*, 2 Penn. R. 204. To give an action of trespass by the partners, would make the contract equivalent to the protection afforded by the owner’s dwelling house. It would be putting it under perpetual lock and key as to all his private debts.

It is supposed that *Dob v. Halsey*, 16 Johns. R. 84, gives countenance to this action. That was assumpsit by two out of three partners, to recover the price of goods sold by a third, because he had turned them out in payment of his private debt. The plaintiffs were nonsuited, on the ground that *all* the partners had not joined. The action was a singular one. The decision seems to suppose that after a partner has sold the goods of the firm in payment of his honest debt, without any fraud as against himself, he may join his co-partners in an action to recover the price of the goods—a price which, when recovered, he may release, or still use the avails for his individual benefit. Admitting his copartners to have been defrauded by the sale, a bill in equity against him and the vendee, would seem to be the more obvious remedy. In *Roderiques v. Heffernan*, 5 Johns. Ch. R. 417, a bill was filed and relief obtained in that form, for such an injury. The state of accounts between the partners should be inquired into, and if the firm be not injured, the vendee should not be disturbed. He has obtained no more than the law would give him, on execution against the man from whom he received the goods. Independently of an account, and especially where the action at law is in the name of all the partners, I cannot but think the decision of the supreme court of appeals of Kentucky in *Owings & Co. v. Trotter*, 1 Bibb, 157, denying an action to the firm, more in accordance with the law and justice of the case.

In the state of Vermont, all preference of partners or their creditors by way of lien over an attachment or execution for the debt of a sole partner has been entirely repudiated, “both at law and in [*398] equity. *Reed v. Shepardson*, 2 Verm. R. 120.

On the other hand, there is no doubt of the *equitable rule* in England,
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New-York and most of the states, that, though the sheriff may at law levy on and sell the right of the individual partner, which shall pass absolutely to the purchaser, yet he takes subject to an account between the partners, which if it eventuate against him, his purchase may go for nothing. That, however, is his own look out. It is no reason why the creditor should be deprived of his legal right to sell, or the purchaser of his right to buy. In *The King v. Sanderson, Wightw.* 50, 53, Macdonald, Ch. Baron, said: "In cases of execution by a subject, it is generally settled that the whole must be taken in execution and sold, and the purchaser becomes a tenant in common with the other partners." *Vid. United States v. Hack,* 8 Pet. 271, 275, 276. The English cases to this effect are collected in a note to *Smith's case*, 16 Johns. R. 106 to 109. The very idea of going into equity concedes the right of the sheriff to sell at law. On the question coming before Chancellor Kent, he refused to restrain the sheriff, admitting his absolute right at law not only to levy, but sell. *Moody v. Payne*, 2 Johns. Ch. R. 546. The bill was filed by the co-partner of the debtor. So in *Brewster v. Hammet*, 4 Conn. R. 540, the common goods were attached for the debt of one partner; but, on execution coming out, stayed in the hands of the sheriff. On bill filed by the other partners, though the firm was insolvent, the court denied them any relief, saying the property would be safer in the hands of the creditor, than if delivered back to the *insolvent partners*. Hosmer, Ch. J. said: "If the creditor take the property, he assumes a liability to the equitable demands of the creditors of the firm upon him; and their interest will be better promoted by leaving them to the redress, to which they have a claim, than by placing the fund in the possession of their insolvent debtors." He reviewed the cases, and concluded that the equitable property in the goods was vested in the creditors of the partnership; but added, "in all events the partners have no equitable claim to the restoration of the goods." [*399] "They were of course sold by the sheriff at law; and taken entirely away from the partners. The bill was simply dismissed. Thus the doctrine is not only of an equitable nature purely, but even in a court of chancery is received under various qualifications and restrictions which can never enter into an action at law. In *Hoxie v. Carr*, 1 Sumner, 181, Story, J. says: "Upon a dissolution of a partnership, each partner has a lien upon the partnership effects, as well for his indemnity against the joint debts, as for his proportion of the surplus. But the creditors of the partnership, as such, have no lien upon the partnership effects for their debts; *their equity* has been truly said to be *the equity of the partners*, and is to be worked out through the rights of the latter." It follows that, if there be no creditors, no claim of surplus, or if the partners be insolvent, even a court of chancery will withhold its aid. That the lien is purely equitable, may be inferred from what

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was farther said in the case cited ; viz, a purchaser *without notice* holds discharged of the lien. It is in its nature, therefore, no more than the lien raised in chancery for the purchase money of an estate. Story, J. was speaking on a bill filed by a copartner to enforce the lien against a purchaser ; and that chancery alone is the forum ordinarily resorted to, may be seen by various other cases which treat of the same subject. *McCulloh v. Dashiell's Admr.* 1 *Harr. & Gill.*, 96. *Story v. Moon*, 3 *Dana's R.* 331, 334. *White v. Dougherty, Mart. & Yerg.* 309. *Gilmore v. The North American Land Co.* 1 *Peters' C. C. R.* 460, 465. *Pierce v. Pass*, 1 *Porter*, 232. In *M'Donald v. Beach*, 2 *Blackf.* 55, 58, Holman, J. said : “It is contended that the separate debt of one partner should not be paid out of the partnership estate until all the debts of the firm are discharged. This doctrine is correct, but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors.”

I admit that courts of law have sometimes felt able to apply this equitable doctrine. One instance is, where an “action for a [*400] false return was brought against the sheriff, on the ground that he had omitted to levy on partnership property under process of domestic attachment or *f. fa.* against an individual partner. *Dunham v. Murdock*, 2 *Wendell*, 553. *Pierce v. Jackson*, 6 *Mass. R.* 242. *Phillips v. Bridge*, 11 *Mass. R.* 242, 249. *Commercial Bank v. Wilkins*, 9 *Greenl.* 28. *Tappan v. Blairsdell*, 5 *N. Hamp. R.* 189. This is on the obvious ground that the plaintiff has lost nothing but that of which a court of chancery would have deprived him ; and the sheriff ought not to be held accountable for doing what the court of law sees that a court of equity would have compelled him to do. So the equitable right was tried at law where a partner sold out his share, covenanting against liens ; the balance on an account, *inter se*, was decidedly against him, for which it was held his copartner had a lien, and so the covenant violated. *Hodges v. Holeman*, 1 *Dana*, 50, 53. Other like instances exist, some of which I shall hereafter have occasion to notice.

It is said this court is in the habit of arresting the sheriff’s proceedings, on the application of the debtor’s partner, that it will order an account to be taken by the clerk, and then direct the sheriff to pay such share of the proceeds to the copartner or shall appear to be his due. Something like this was indeed done in *Eddie v. Davidson, Doughl.* 650. The case, however, recognized the sheriff’s right to sell, and the order was in terms to pay a part of the *money levied*, to the assignees of the copartner. The assignees obtained the order. A like order was made A. D. 1816, in *The King v. Rock*, 2 *Price*, 198, on motion by partners ; and the court said there had

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been many instances of such a reference, but they denied an *amoveas manus*, thus recognizing the right to sell. *Vide note, id.* 198. Lord Eldon said, A. D. 1813, in *Waters v. Taylor*, 2 *Vesey & Beames*, 301, “According to the old law, I mean before Lord Mansfield’s time, the sheriff, under an execution against partnership effects, took the *undivided share* of the debtor without reference to partnership accounts: but a court of equity

would have set that right by taking an account, and ascertaining [*401] what the sheriff “ought to have sold. The courts of law, however, have now repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities; depending on an account of all the partners for years?” The action of the courts of law, however, seems not to have been by any means so uniform as Lord Eldon supposed. The rule alluded to by him had been applied for to the chief baron in *Chapman v. Brooks*, 3 *Bos. & Pult.* 289, but the application was unanimously refused; the court all saying the question belonged to a court of equity; that they had no power to take an account: and that the sheriff had a perfect right to go on and sell. Lord Alvanley said he hoped that would be the last application of a similar kind. [See two like cases before that in the same book, pp. 254 and 288.] Chambre, J. mentioned that in *Eddie v. Davidson*, no objection was made to the sale; but there was merely an application for a share of the proceeds after sale; and no objection to the motion by the party levying. In *Parker v. Pistor*, 3 *Bos. & Pult.* 288, 289, the court said all the difficulties were to be encountered in equity, the case being plain at law. “That the safest line of conduct for the sheriff to pursue, was to put some person in possession of the defendant’s share as vendee, leaving him and the parties interested, to contest the matter in equity, where a bill might be filed stating that he had taken possession of the property, and praying that it might not be disposed of until all the claims were arranged.” This appears to be the approved practice in Connecticut. *Witter v. Richards*, 10 *Conn. R.* 37, 43, *per Williams, J.* who cites and approves the direction in *Parker v. Pistor*.

But admitting that this court would interfere on a non-enumerated motion, that would be but equivocal evidence at best that the lien in question is of a legal character. Such a motion is very often in principle the mere substitute of a bill in equity. There are divers cases in which courts of law [*402] have recognized and acted upon the lien when it arose “collaterally; but these present exceptions to their ordinary course. They have not, in any instance that I can find, allowed the preference as matter of law; but only availed themselves of an accidental relation or condition, to

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apply it as the rule of equity. In all such acts, they admit themselves to be out of their natural element. We have seen several instances already, and I will notice a few other cases, in which the question has been considered by courts of law: some taking measured steps, and others declining all interference. In *White v. The Union Insurance Company*, 1 *Nott & M'Cord*, 556, the defendants were bound to pay dividends on stock belonging to a firm. The dividends became due, and were declared, after the sole surviving member of the firm had assigned the partnership effects to trustees for the payment of partnership debts, the firm being insolvent. An action was brought to recover the dividends, and held to be sustainable in the name of the assignees. The defendants proposed to set off a debt of the surviving partner alone. The peculiar shape of the action and positions of the parties here, enabled a court of law to let in the equitable doctrine, which they did. Yet the legal doctrine is well settled as a general one, that where a surviving partner sues for a debt of the firm, whatever he owes in his individual character to the defendant may be set off. The learned judge (Bay, J.) who delivered the opinion of the court, admitted this to be so, citing *Mont. on Set-off*, 24. *Vid. also Meader v. Scott*, 4 *Verm. R.* 26, 29, and *The same v. Leslie*, 2 *id.* 569. But the learned judge thought the doctrine must be confined to cases where the firm is solvent. Yet how is that to be decided without a general account? In *Schatszill v. Bolton*, 2 *M'Cord*, 478, the funds of a firm were seized on foreign attachment against one of the partners for his sole debt. The court, by Richardson, J. said it was too well settled to be questioned that partnership property is liable to be taken in execution against one of the partners; citing some of the English cases and our case of *Mesereau v. Norton*. He added, the possibility of their being liens by partnership creditors which may take away the chattel from the purchaser, is no objection to the sale. There being a "lien" [*403] on property, as by mortgage, &c. does not prevent a sale subject to the lien, &c. The right against one of several partners in virtue of a foreign attachment, forms a conspicuous head in the American books. *Knox v. Schepler*, 2 *Hill*, 595, was the case of a *foreign attachment* against a surviving partner for his individual debt. He owned one-third of the partnership effects. The court held that the attachment lay; but though at law he owned the whole by survivorship, they ordered but one-third to be paid over to the attaching creditors. This was one-third gross, for the court refused to take an account. Under the circumstances, however, they required the attaching creditors to give bond with surety, that they would abide the event of an account as between the partnership rights, and refund in favor of them and partnership creditors, on the principles of equitable preference, should that be so decreed. Harper, J. said that had been the course in *Schatszill v. Bolton*. Then, speaking of the one third in question before

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him, "Can we," he asks, "go into an investigation of the equities which may exist against it? Can we determine that there are creditors of the firm having a better claim to this fund? or that upon a final accounting with the representatives of the deceased partners, *the absent defendant* may not be found a creditor of the firm, and entitled to retain all he has in his hands; or indeed that there has not been a final accounting, as the partnership seems to have been long dissolved?" The inquiry was declined.

Even the supreme court of Pennsylvania, possessing as they are known to do both equitable and legal powers, decline stopping to take an account. In *M'Carty v. Emlyn*, 2 *Dall.* 277, 2 *Yeates*, 190, *S. C.*, the money of a firm was seized by foreign attachment for the separate debt of a surviving partner. His interest was one half. The counsel of the garnishee moved a stay till an indemnity could be obtained against the foreign attachment. The motion was denied, and one half the money was ordered to be paid over absolutely to the plaintiff. *M'Kean*, Ch. J. and all the court admitted the rule in equity. But he animadverted on the granting of such an [*404] application. He said a partner may "owe separate debts, and his property may consist of partnership stock; yet if the objection prevails, it is impossible to conceive when the separate creditors will be able to make that property responsible. While the partnership continues, how shall they compel a disclosure and liquidation of all the debts and credits of the company? and even when a partnership is dissolved, where will the separate creditors find the inclination or the power to scrutinize and close the records of a long and complicated mercantile connection? But the law is happily otherwise: for it has been repeatedly settled here as well as in England, that a partner may be sued for separate debts; that the partnership effect may be taken in execution and sold *by moieties*; and that the purchaser of the moiety, under the execution, shall be considered as tenant in common with the partner owning the moiety." All this he considers proved by the very case before Lord Mansfield, *Eddie v. Davidson*, now relied on to show the contrary. The doctrine was afterwards glanced at in *Knox v. Sumners*, 4 *Yeates*, 477. A levy had been made under a *f. fa.* for the separate debt of one partner, and there was a subsequent levy under a *f. fa.* for the joint debt. As between these conflicting levies, the execution for the separate debt was postponed to the other; but mainly on the ground of fraudulent delay after the first was levied. In 1829, the important case of *Doner v. Stauffer*, 2 *Pennsyl. R.* 198, was heard and much considered. All the partnership effects had been levied upon and sold under executions against two partners for their separate debts; some against one and some against the other. The firm was *insolvent*, and one of the partners sought to have the avails for which the effects had sold applied in payment of the firm debts, claiming that he was answerable for the whole debts of the firm. The court

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held, that under the circumstances, it did not lie with him to interpose ; that neither he nor his copartner had any interest remaining, nor could the joint creditors claim through the partners ; that all the interest, legal and equitable, of the latter was gone. The court examined the right acquired by the purchaser under the separate executions. Gibson, "Ch. [*405] J., in delivering their opinion, entered into a learned examination of the principle on which the preference of partnership creditors rests, and came to the well settled result that the execution creditor sells and the purchaser takes, not the chattels of the partnership, but the interest of the partner incumbered with the joint debts. That the creditors of the firm have therefore no claim to the proceeds of the sale, which must consequently be paid over to the execution creditor of the separate partner. The recourse of the firm creditors is necessarily to the property in the hands of the purchaser.

Several other cases in different parts of the union have presented and discussed the question when it arose in the proceeding by foreign attachment ; some refusing to recognize the preference, and others going strongly to favor it ; more strongly even than the South Carolina cases. Among those denying the preference, is *Wallace v. Patterson*, 2 *Har. & McHen.* 463. Among those going most strongly to favor it, are *Gardiner v. Smith*, 12 *Lou. R. (Curry.)* 370 ; *Church v. Knox*, 2 *Conn. R.* 514 ; *Fisk v. Herrick*, 6 *Mass. R.* 271 ; *Upham v. Naylor*, 9 *id.* 490 ; *Barber v. The Hartford Bank*, 9 *Conn. R.* 407, and *Lyndon v. Gorham*, 1 *Gallis.* 367. The great favor generally shown to partnership property in New-England as against a foreign attachment for the debt of one, did not get a foothold without able resistance. I allude to the dissenting opinion of Hosmer, J. in *Church v. Knox*, 2 *Conn. R.* 522. At most, it now stands but as an exception to the general rule. In *Lyndon v. Gorham*, Story, J. said : "I consider that the present [foreign attachment] is a process in the nature of a bill in equity, to reach the funds of a debtor, and subject to all the liens and equities between the original parties ; and in order to do complete justice, it is necessary that all proper parties should be before the court." 1 *Gall.* 370. In the 1st vol. of his *Treatise on Equity*, 625, ch. 15, § 675, he says the preference seems incapable of being enforced in any other manner than by a court of equity : at law, he says, it is generally disregarded.

So far the cases fully illustrate the position, that in whatever [*406] form the preference in question has been enforced, whether directly by chancery, or by action on motion, or by foreign attachment, the courts have always considered themselves as departing from strict legal right, and administering an equity. Such, also, was the case of *Crane v. French*, 1 *Wendell*, 311, on non-enumerated motion. The sheriff holding two execu-

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tions, one against the firm, the other against a single member of it, sold the common property ; and this court directed him to prefer the joint execution in the distribution. Chancery cases were manifestly cited as authority. The only case in a court of law at all relied upon was one in this court evidently depending on the same equitable principle. *The matter of Smith*, 16 Johns. R. 102. That was the case of an attachment under the absconding debtor act, which, like a foreign attachment, covered all choses in possession and action of the debtor ; and this court took it upon them to declare the extent to which such an attachment, founded on the debt of an individual, should operate on the effects of his copartners. Under the circumstances, they ordered the partnership books, goods and moneys to be restored to the copartner not proceeded against, saying he had a right to retain them for the payment of the partnership debts. They said the case of partners is different from that of tenants in common of a chattel. All that is undoubtedly so in equity : and it is evident the court speak in the light of equity, for they concede the legal right, in the language of the cases decided under the legal rule. The identical question before them was afterwards entertained by Chancellor Kent on a bill in equity, *Robbins v. Cooper*, 6 Johns. Ch. R. 186, though we have seen he refused to interfere with an execution in a like case. Whoever heard of a right of action growing out of an equity ? an action of trespass like the one before us, or like *Lewis v. Thurber*? Suppose the court had not stopped the sheriff in *Smith's case*, would he have been a trespasser in selling ? They said the attachment was like an execution ; yet in both the leading cases upon execution before cited from *Doug.* and *Bos.* & *Pull.* the court sanctioned a sale : [*407] in the one giving a direction as to the proceeds, and in the "other refusing to interfere. In *Smith's case*, this court mentioned *Fox v. Hanbury*, Cowl. 445, 449. But there the whole reasoning of Lord Mansfield and his judgment in the case, and all the authorities cited by him, concede the power of the sheriff to sell, and of the purchaser to take and convert to his own use. He admits this in every shape, both at law and in equity. Only in the latter case he says the vendee takes as tenant in common, but subject to an account. No one has denied that, since 1776. It is the law of another court, where a tenant in common always holds subject to some sort of account. But his rights at law are not therefore the less. He may take and remove the goods and enjoy them exclusively ; but must account for the profits. If they are partnership goods, and that known to him, equity will, under circumstances, also hold him to account for the full value in favor of partners, or through them, to creditors.

The attempt to enforce the equitable rule at law in the form of trespass or trover against the sheriff or purchaser has failed, even where the sheriff proceeded under foreign attachments, in respect to which the preference of

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the joint creditors has been singularly favored. *Shaver v. White*, before cited from 6 *Munf.* is one instance. The seizure was there under foreign attachment against one of several partners, for his sole debt, on which the cattle of both partners were taken contrary to their consent, yet an action by both was held not to lie. In December term, 1839, an action of a like character was heard at the suit of the partner not named in the foreign attachment, and decided against him by the supreme court of Pennsylvania, *Morgan v. Watmough*, 5 *Wharton's R.* 125. This case seems to have been well argued, and the doctrine in the New-England cases was especially urged as giving countenance to the action. Thus, whether the action has been brought by both partners or by one, it has so far always failed. Authority and principle are equally against it. I do not deny that there are *dicta* which look like a restraint on the sheriff. In *Crane v. French*, 1 *Wendell*, 313, it was said the sheriff does not deliver possession. With deference, *I do not see that the *authorities will justify his refusal* [*408] *to deliver possession*, either at law or in equity, except under the sanction of some court qualified to direct him in such a course. It is not necessary to deny that this court may do so under special circumstances; though the power of this court, or even of a court of equity, to interfere and stay execution till an account shall be taken, cannot, I think, be sustained. It seems to me that Chancellor Kent was right in the case cited when he refused to stay a sale even in equity; and that the advice of the English common pleas and other courts should be followed: that is, to let the sheriff take his course according to his undoubted legal right, selling the goods, and leaving the copartners and copartnership creditors to their relief in equity. I know that since the cases of *Dob v. Halsey* and *The matter of Smith* in 16 *Johns. R.* and *Crane v. French*, an impression has prevailed that the sheriff might be controlled by a motion; and that this court might even stop him, and order an account. No case in any court has gone the length of saying that; but it has again and again been denied; and that sort of relief has often been refused. I remember nothing of the practice of this court; nor do I believe that either justice or convenience calls for its adoption. It seems to me the English common pleas were right when they said the conflict between suitors for joint and separate debts can be settled by chancery alone. Creditors and partners not before the court must be made parties, complicated accounts for years must be settled, a large concern to be wound up perhaps. This court has neither the abstract power, the process, the officers, nor any of the proper machinery for prosecuting such a business. How is this court to decide on motion, even whether there be a partnership or not? Be this as it may, however, and whether we ought ever to interfere summarily or not, the argument can have no bearing in favor of this novel remedy by *trespass* or *trover*.

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My opinion is that a new trial should be granted ; the costs to abide the event.

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The common council of a city, incorporated as such *subsequent* to 1st January, 1830, have no power under the *general act* to determine and limit the number of *commissioners of deeds* to be appointed in such city ; the power is confined to the *common councils* of cities created previous to that date : and *accordingly it was held* that the appointment of a *commissioner of deeds* by the governor, with the advice of the senate, for a city incorporated since 1st January, 1830 *was not a valid appointment.*

INFORMATION in the nature of a *quo warranto*. On the third day of July, 1840, the attorney general filed an information in the nature of a *quo warranto* against the defendant, charging him with having usurped and exercised the office of a *commissioner of deeds* in the city of *Buffalo*, without lawful authority on the 15th May, 1840, and from thence until the time of the exhibition of the information. The defendant pleaded that on 29th December, 1839, the *common council* of the city of Buffalo, at a regular and legal meeting of the board, by resolution *limited* the number of commissioners to be appointed in the city of Buffalo, so that there should be in the said city *seven commissioners of deeds* including those then in office ; that at the time of the adoption of such resolution, there were residing in Buffalo two commissioners of deeds who had been theretofore duly appointed *for the town of Buffalo*, and that there were no more commissioners of deeds in office in the city of Buffalo at the adoption of such resolution ; that a copy of the resolution was duly transmitted to the governor of the state, and that on the 21st January, 1840, the defendant was duly appointed by the governor, by and with the advice and consent of the senate, a *commissioner of deeds* of the city of Buffalo. That the commission was duly filed in the clerk's office of the county of Erie, and that on the 28th January, 1840, he took and subscribed the oath of office ; and that by reason of the premises he had claimed, and had used and exercised the office of *commissioner of deeds* for the city of Buffalo, as it was lawful for him to do, traversing the usurpation, &c. To this plea the attorney general demurred, and the defendant joined in demurrer.

[*410] *Willis Hall, (attorney general,) for the people.

N. K. Hall, for the defendant.

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By the Court, NELSON, Ch J. The city of Buffalo was incorporated in 1832, *Statutes of that year*, p. 297, and the *common council* of the city were empowered to appoint various officers for the orderly and convenient government of the place. No authority, however, was given for the appointment of commissioners of deeds, nor is any thing found in the act of incorporation in any manner relating to that office.

The 1 R. S. 92, § 2, provides, that the common council of each of the cities in this state, (except the city of New-York,) on or before the first day of January, 1830, and once at the end of every two years, shall determine and limit the number of commissioners of deeds to be next appointed for their respective cities. This power had been previously referred to in the classification of public officers, p. 88. The appointment is made by the governor and senate, p. 98, § 15. The defendant has been regularly appointed under this last section, and the question is, whether the provisions are applicable to this city.

The power to create public offices, or to multiply the number of officers, is a high and responsible one, and should not be exercised unless under a clear warrant from the proper authority. The annual session of the legislature affords a speedy remedy for any inconvenience that may arise from a cautious exercise of the power. Neither should courts give to a statute a broad and unrestricted application, however convenient to the public, when by its terms it is apparently confined to particular objects. The distinction between acts of general application, and those of a limited and particular design, is familiar and easily expressed. Taking the latter view of the section before us, § 2, p. 92, every part of it becomes material and pertinent, and was essential to express the intent we suppose the legislature had in view. It had previously fixed the limit of these officers in the city of New-York, p. 88, and was providing "for the like in the [*411] other cities. The several acts were passed in 1828, and it was practicable, therefore, to declare that the common councils of the cities then existing, on or before the 1st January, 1830, (when the acts went into operation,) and once every two years thereafter, should determine the number of commissioners to be appointed. But the language can only be applicable to cities existing anterior to January, 1830. The common council of such only could meet and execute the power conferred; not cities created two years afterwards. These alone must have been in the mind of the legislature, as the terms necessarily exclude those that might subsequently come into existence. The 9th section carries out the same view. It vacates the offices of present incumbents in cities on the 1st January, 1830. In support of this limited construction we may also refer to the familiar principle, that corporations are creatures of the statute, and possess no powers except those expressly given or which are necessary to carry into effect the purpo-

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ses for which they were created. Clearly, no such powers as are here claimed for this city, are any where expressed, nor can we see any ground for raising them by implication.

Judgment for plaintiffs.

THE MECHANICS' & FARMERS' BANK *vs.* DAKIN and others.

Where there are two establishment in the same place for the carrying on the business of transportation of goods, both conducted by the same individual, in one of which he is a partner, and in the other sole proprietor, and he obtains moneys from a bank on checks drawn by him signed in his own name generally as agent: in an action by the bank against the firm, for the recovery of a balance due upon such checks, the firm have the right to show that they are not indebted to the bank, and that the indebtedness, if any, is by the individual solely who drew the checks, where there is no proof that the other members of the firm knew the mode in which the checks were drawn.

A plea in abatement for the non-joinder of parties admits the plaintiff's claim, but not the amount; the defendant failing to establish his plea, may contest the whole or any part of the plaintiff's claim, the same as on a plea of the general issue. He, however, must submit to a verdict against him for nominal damages.

[*412] *Where a defendant pleads the non-joinder of one as a co-defendant, and on the proof it turns out that there are three persons who should have been joined, the plaintiff is entitled to a verdict notwithstanding that the plea is verified. The defendant should have named all the joint contractors not on the record.

So where four persons were sued as joint contractors, and were described as copartners carrying on business under a particular name, and one of them put in a plea in abatement alleging the non-joinder of three other persons; to which the plaintiff replied that the defendants were members of an association called *The New-York and Geneva Line*, formed for the transportation of passengers, and had omitted to file a statement of the names of the persons composing the association; and the defendant rejoined that he was not a member of an association transacting business under such name; it was held, that the plaintiff was entitled to a verdict, notwithstanding that it was proved that the defendant was not a member of the association named, but of another association: on the ground that the substance of the issue only is required to be proved, and that the name of the association specified in the pleadings may be regarded as surplusage.

THIS was an action of *assumpsit*, tried at the Albany circuit in October, 1839, before the Hon JOHN P. CUSHMAN, one of the circuit judges.

The suit was brought against Eldridge Dakin, Nicholas Kip, John Rice and Stephen Rice. The declaration described the defendants as copartners in the business of the transportation of passengers and property by boats and vessels, under the name, style and firm of "*The New-York and Geneva Line*," and contained the money counts only. The defendant *John Rice* pleaded in abatement that *John V. R. Schermerhorn* should have been joined as a co-defendant, the promises in the declaration having been made by him jointly with the defendants. Upon this plea the plaintiffs took issue. The

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defendant *Stephen Rice* also pleaded in abatement, that not only *John V. R. Schermerhorn*, but also *Henry Woolsey* and *Ezekiel Clark* should have been joined as co-defendants. To this plea the plaintiffs replied, (protesting that the promises, &c. were not made by the defendants jointly with Woolsey, Clark and Schermerhorn,) that the defendants, at the several times, &c. at the city of Albany, &c. were copartners and members of an association under the name of "*The New-York and Geneva Line*," formed for the transportation of passengers and property, and that they carried on their business through the county of Albany; by "means where- [*413] of, and by force of the act entitled "An act to compel voluntary associations to furnish to the public the names of their members," passed 20th May, 1836, the association were required to make and prepare a statement of the names of the persons composing the association, and to file the statement in the office of the clerk of the county of Albany; but that at the time of the making of the promises and at the time of the commencement of this suit, they had neglected so to do, concluding with a verification and prayer of judgment. The defendant *Stephen Rice* rejoined, that at the several times in the declaration mentioned he was not a member of any association under the name of "*The New-York and Geneva Line*," in manner and form as alleged in the replication, concluding to the country. On these issues the cause went to trial.

The defendants proved that the *four* defendants against whom the suit was brought, *together with* John V. R. Schermerhorn, Henry Woolsey and Ezekiel Clark, constituted a company for the transportation of goods called "*The Penn Yan and Geneva Line*," and that *John V. R. Schermerhorn* was their agent for conducting their business, by raising money, &c. in the city of Albany. This line was formed in January, 1836, or previous to that time. Before this testimony was given, the plaintiffs had proved the payment of five checks drawn upon them in the month of December, 1836, amounting together to the sum of \$2126,32, drawn upon them by *J. V. R. Schermerhorn*, and signed, "*J. V. R. Schermerhorn, agent.*" The plaintiffs called Schermerhorn as a witness, and he testified that in 1836 he was a member of "*The Geneva and Penn Yan Line*," and also during the same year carried on the business of transporting goods on his own account, under the name of "*The New-York and Geneva Line*;" that he drew checks on the plaintiffs for the benefit of the latter line, affixing thereto the name and addition of "*J. V. R. Schermerhorn, agent.*" making no distinction at the plaintiff's bank between "*The Geneva and Penn Yan Line*" and "*The New-York and Geneva Line*," and all his checks were drawn in the name of *J. V. R. Schermerhorn, agent.*" The defendants [*414] offered to prove that the proprietors of "*The Geneva and Penn Yan Line*" were *not indebted* to the plaintiffs; and that the checks given in

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evidence were drawn for the benefit of "The New-York and Geneva Line." This evidence was objected to, and refused to be received by the judge ; to which decision the defendants excepted. The amount claimed by the plaintiffs upon the checks produced was \$359,79.

The defendants moved for a nonsuit, or that the judge direct the jury to find a verdict for the defendant *John Rice*, upon the ground that his plea in abatement was proved, and for the defendant *Stephen Rice*, upon the ground that the plaintiffs had failed to maintain the issue on his plea. The judge refused to nonsuit the plaintiffs or to instruct the jury to find for the defendants on either of the pleas. As to the issue joined upon the plea of *Stephen Rice*, the judge held that the issue in substance was whether Stephen Rice was a member of *an association* formed for the purpose of the transportation of passengers and property of such a character as to subject them to the provisions of the act passed 20th May, 1836, compelling voluntary associations to furnish to the public the names of their members, and directed the jury to find a verdict for the plaintiffs. To which decision the defendants also excepted. The jury found a verdict for the plaintiffs for the amount claimed. The defendants move for a new trial.

S. Stevens, for the defendants.

J. Van Buren, for the plaintiffs.

By the Court, COWEN, J. Schermerhorn was the admitted agent and acting partner of the defendants at Albany. He there did business for them and signed checks as *agent*, and also in the same form for another line in which he was sole proprietor. For both he called himself *agent* ; and, looking at the checks in question, it was entirely ambiguous whether they were drawn for one line or the other ; whether they were due from the defendants or from Schermerhorn alone. I do not understand

[*415] Schermerhorn as saying that the *defendants consented to his doing the business for both lines in his name as *agent* ; and if they had, I do not think it should preclude them from showing the truth as to what checks were drawn for them, and what on Schermerhorn's own account. The defendants offered to show that all the moneys were in fact obtained by the witness on account of himself. Certainly his testimony for the plaintiffs, though clear and positive, was not conclusive. He might have been impeached or contradicted. I see nothing in the case absolutely binding the defendants to pay all checks drawn by Schermerhorn as *agent*. It is said that *J. V. R. Schermerhorn, agent*, was the name of their firm at Albany ; but it was also the name there of Schermerhorn's own line. Which, according to the offer, in fact had the money ? If Schermerhorn drew on his own account and used the money, how can the defendants be made liable ? Sup-

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pose he had sworn that the money was obtained for himself and used for his own benefit, had the defendants done any act which estopped them? Had they been the sole firm acting at Albany in the name of "J. V. R. Schermerhorn, agent," they would have been estopped; but there were two distinct firms of that name whose business was conducted by the same man. I do not find it in the evidence, as the plaintiff's counsel supposes, that the defendants ever consented to a blending of the business of the two lines under one name, so as to make themselves liable as well for all the debts of Schermerhorn's line as of their own. At any rate, he does not testify that all the defendants were consulted and consented to such a form of business. It was in fact so done, but of his own head. The offer of the defendants was a strong one; it was to show the defendants not indebted to the plaintiffs; that the checks were the witness Schermerhorn's own.

It may be said that the pleas in abatement admitted the plaintiff's claim. They certainly did; but not the amount of it. The defendants failing to sustain them by proof, as I think they did, the effect was the same as a judgment by default. Nominal damages were admitted, and these the plaintiffs were entitled to recover at all events. The defendants [*416] could not entirely defeat the plaintiffs; but might contest the whole or any part of the claim given in evidence, the same as if the general issue had been pleaded. Their only disadvantage was that they must finally submit to a verdict of nominal damages. This would be the effect of their unfounded pleas in abatement, not of the evidence in the cause. *Waggener v. The Bells*, 4 Monroe, 11. *Haley v. Caller*, 1 *Alab. R.* 63.

John Rice's plea in abatement clearly failed. He pleaded promises made by the defendants jointly with Schermerhorn only, whereas the real promissors were the defendants with Schermerhorn and two others, Clark and Woolsey. In pleading a non-joinder, it is perfectly well settled that you must name all the promissors who should have been joined. If you can abate by pleading one and proving more, a second suit may be abated in the same way, and so a third. You must give the names truly, so that the plaintiff may have a good writ or declaration the second time. He need not wait till the plea in abatement be tried, but may immediately enter a *cassetur billa*, and commence a new action against all the persons whose names are furnished. *Tidd's Pr.* 626, 632, *Am. ed.* of 1807. Under our rule 96, upon a plea of non-joinder, the plaintiff may amend on terms, of course. It is entirely settled in England, that if the plaintiff take issue, though the defendant at the trial shew the promise to have been made jointly with the person he has named in his plea, yet if it appear that another or others not named by the plea as defendants were also joint contractors, the proof fails, and there must be a verdict for the plaintiff. 8 *Chit. Pl.* 899, note (F.) *Am. ed.* of

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1828. *Per De Grey, C. J. in Abbott v. Smith*, 2 *Black. R.* 951. *Per Gibbs, C. J. in Godson v. Good*, 2 *Marsh.* 302. *Per Denison, J. in Pearce v. Davy*, 1 *Kenyon's R.* 366. The last case holds that all the joint contractors not on the record must be named in the plea, and positively sworn to be joint contractors by the party pleading; not shown to be so merely by way of inference from circumstances. It is none the less important with us to adhere to the same practice. It enables the [*417] plaintiff, by a single amendment under rule 96, "to perfect his writ or declaration, or both, accordingly as he may have commenced his suit by a capias or declaration.

In regard to Stephen Rice, the course of pleading was this: The plaintiffs declared against four persons, averring they were partners under the name, style and firm of the *New-York & Geneva Line*. He pleaded that the promises, if any, were made jointly with three others. The replication was that the defendants were members of a company by the name of the *New-York & Geneva line*, which should have been registered in the Albany clerk's office; and, not being so, were ousted of a right to plead in abatement, by the statute, *Statutes of 1836*, p. 58 2, ch. 385, § 1, 2. The substance, both of the declaration and the replication, was, I think, that the defendants were partners in contracting the debt. Suppose they had pleaded the general issue, and the proof had been that they had all jointly received the money under the name of the *Penn Yan & Geneva line*, instead of the firm mentioned in the plaintiff's declaration; surely that would have been no defence. The issue would be whether the defendants were jointly liable; and whether their firm were called A. or B. would not vary the material fact. Now here, the plaintiffs have shown, in substance, that the defendants were members of an association, which, not being registered in the Albany clerk's office, had no right to plead in abatement. Stephen Rice, in his rejoinder, says in substance, that he never was a member of such a company as the plaintiffs had described; and it comes out in proof that he was. I think the name *New-York & Geneva line* may be considered as if stricken out of all the pleadings. The name was entirely impertinent, and foreign to the real question between the parties. That was merely whether they were a company within the statute, by one name or another, or no name at all. It is admitted they were, by the name of the *Penn Yan & Geneva line*.

Every book on evidence declares that the substance of the issue alone need be proved; and, in searching for that, the distinction between immaterial and impertinent averments, has been well understood and often acted on, ever since *Bristow v. Wright, Doug.* 665. *Peppin v. Solomons*, *5 *T. R.* 496. *Williamson v. Allison*, 2 *East*, 446, 452. [*418] *Wilson v. Codmans's execr.* 3 *Cranch*, 193. A declaration against

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partners is just as well, though it do not mention the defendants as partners at all. *Mack v. Spencer*, 4 *Wend.* 411. *Wardell v. Pinney*, 1 *Wend.* 217. And though it falsely allege that they became liable as acting in a certain name, it is no answer to say they did not act in such name. A declaration averred that John Lowe, *trader, and surviving administrator of S. F.*, made his bond. The court said, if the description were not true, it might be rejected as surplusage. *Clark v. Lowe*, 15 *Mass. Rep.* 476. In the replication here it was material to show a company; but be their name or firm what it might, they were equally liable, and equally bound to register their names, in order to avoid a suit against separate members. The particular name under which they did business, was material neither to their liability nor their obligation to become registered.

The Rices, therefore, clearly failed in sustaining their pleas in abatement; and the defendants were properly holden liable.

But they had a right to contest the amount of damages, by the proof offered. The learned judge, we think, erred in overruling the evidence.

Therefore, we direct a new trial, the costs to abide the event.

FROST vs. THOMAS.

A special deputy is bound to show his warrant if requested to do so, and if he omit, the party against whom the warrant is may resist an arrest, and the warrant under such circumstances is no protection against an action for an assault, battery and false imprisonment.

ERROR from the Montgomery common pleas. Thomas sued Frost for an assault, battery and false imprisonment. The defendant attempted to justify as a *special deputy* in serving a *warrant for larceny*, issued by a justice of the peace. The plaintiff required the defendant to show him "the warrant, before he would submit to the arrest, which the defendant not doing, the plaintiff resisted and the defendant beat him. The court charged the jury that if the defendant did not show the warrant to the plaintiff, he was a trespasser. The jury found a verdict for the plaintiff, and the defendant on a bill of exceptions, sued out a writ of error.

N. Hill, Jun., for the plaintiff in error, insisted that a special deputy authorized to execute a criminal warrant, is not a trespasser for refusing to show his warrant at the time of the arrest. He cited *Arnold & Steves v. Frost*, 10 *Wendell*, 514; 1. *Russell on Cr.* 513, n. e. and 516; 1 *Hale's Pleas of the Crown*, 459; *Roscoe's Cr. Ev.* 626; *Cro. Jac.* 485; 9 *Co. 69*; 6 *Id.* 54; 2 *Hawk.*, B. 2, ch. 13, § 28; 1 *Chitty's Cr. L.* 50, 51.

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J. A. Spencer, contra.

The court *held* that a special deputy is bound to show his warrant if requested to do so, and if he omit, the party against whom the warrant is may resist an arrest, and the warrant under such circumstances is no protection against an action for an assault, battery and false imprisonment. *See The People v. Hubbard, ante.*

Judgment affirmed.

THE FARMERS' AND MANUFACTURERS' BANK *vs.* WHINFIELD.

Where a bond and warrant of attorney were given for a sum certain, *payable on demand*, to secure the payment of certain specified notes, and a writing was entered into by the obligees of the bond stating the object of the transaction, and appropriating the proceeds of the judgment to be entered, it was held, that *parol* evidence was inadmissible to shew an agreement entered into at the time of the execution of the papers enlarging the time of payment of the notes.

IT WAS HELD, however, that it was competent in such case to show by *parol* evidence the nature of the transaction and the object and purpose of the parties; and also to show [*420] fraud on the part of the obligees by the *misreading* *of the paper specifying the terms upon which the bond and warrant were executed.

Such fraud, however, if found, would not vitiate the judgment; it would only affect the instrument misread, leaving the judgment to operate according to the real intentions of the parties.

A court are not bound to receive *irrelevant testimony* from one party, because such testimony has been given by the other party without objection.

Where irrelevant testimony is permitted to go to a jury, a new trial will be granted of course on a *bill of exceptions*, if the chances are equal that it may have had an injurious tendency on the minds of the jurors. On a *case*, the court exercises its discretion, when it is plainly seen that no injury could possibly have resulted to the party objecting to the testimony.

It seems, that in no case whatever is it proper to permit a jury to take with them when they retire to consider of their verdict, the documentary evidence submitted on the trial of a cause.

THIS was an action of *assumpsit*, tried at the Dutchess circuit in March, 1839, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The plaintiffs claimed to recover against the defendant as the *endorser* of a promissory note for \$600, made by Thomas Williams and George Williams, dated 4th March, 1837, and payable 90 days after date. The defences set up, were : 1. That time of payment had been given to the drawers of the note without the consent of the endorser; and 2. That the plaintiffs had accepted a bond and warrant of attorney from the drawers, by virtue of which a judgment had been entered, an execution issued, and a large sum of money collected; that the bond and warrant had been executed under an agreement that the *proceeds should be rateably distributed* in dis-

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charge of several persons standing in the relation of *endorsers* to T. & G. Williams, and that the defendant was one of those endorsers.

Thomas Williams being released by the defendant, testified that himself and his son George, transacting business under the name of Thomas Williams & Son, being indebted to the plaintiffs about \$16,000, including *overdrawings*, executed to the plaintiffs on the 10th June, 1837, a bond and warrant of attorney to confess judgment, the bond being conditioned for the payment of \$20,000, with interest, on demand. That on executing the bond and warrant, *Vassar*, the president, and *Innis* one of the directors of "the bank, delivered to them a paper writing signed by the cashier of the bank, which was produced on the trial. It recites the execution of the bond and warrant, and declares that the bond and warrant are to be used as *security* for the payment of the debts, liabilities and demands "*hereinafter mentioned in the order hereinafter set forth*"—that is to say: FIRST, to pay an *overdrawing* at the bank to the amount of \$1,684, 21; SECOND, to pay certain notes, some drawn and others endorsed by T. Williams & Son, and all discounted at the bank of the plaintiffs, amounting together to 9,158,89; and THIRD, to pay three certain notes drawn by T. Williams & Son, one of which is the note demanded in this cause; and also to secure any *further advances* or discounts the bank might make to T. Williams & Son, not exceeding \$3,500. The defendant then offered to prove that at the time of the execution of the bond and warrant of attorney, it was agreed by the bank that T. Williams & Son *should have time to the extent of one year* to pay the notes specified in the paper writing: which evidence thus offered was objected to and rejected, and an exception taken by the defendant. Evidence was then given by T. Williams and his son George, going to show that at the time of the execution of the bond and warrant, the paper writing declaring the object of the execution of the bond and warrant was falsely and fraudulently *misread* by the agent of the plaintiffs, in regard to the portions of it giving *preferences* to certain classes of creditors, and that it was not intended by T. Williams and his son George that preferences should exist. This evidence was met by countervailing testimony on the part of the plaintiffs. In reference to the *misreading* of the paper, T. Williams testified, that within a few days after the execution of the bond and warrant, he had an interview with Vassar, and remonstrated with him on the subject. Vassar was present when Williams thus testified, and being called to the stand, was asked by the plaintiff's counsel, "Did any such interview take place between you?" The question was objected to by the defendant's counsel, but it was overruled by the judge, and the defendant excepted. The witness then answered "that he had [*422] no recollection of such interview. In the course of the trial, it appeared that previous to the arrangement of the 10th June, 1837, be-

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tween the plaintiffs and T. Williams & Son, the latter had furnished to the bank a *statement of their affairs*, which was produced on the trial, and a long examination of T. Williams gone into for the purpose of shewing that the statement was fraudulent. At a subsequent stage of the trial, the defendant offered to prove the truth and correctness of the statement, and the plaintiffs offered to prove that the statement was false. The judge decided that the testimony was improper, and that he would not permit it to go to the jury on either side: to which decision the defendant excepted. The counsel for the plaintiff then offered to deliver the *statement* to the jury to take with them when they retired to consider of their verdict; to which proceeding the defendant objected; but the judge overruled the objection, and the statement was delivered to the jury, who took it with them when they retired to consider of their verdict. It appeared that the property of T. Williams & Son was sold under an execution issued on the judgment, and it was conceded that if the defendant was entitled to a *rateable proportion* of the proceeds of the sale, such proportion was \$281,84; and in that case the plaintiffs would be entitled to recover only \$399,53 on the note demanded in this suit. The judge submitted the question of fraud to the jury, who found a verdict for the plaintiffs for the full amount of the note, with the interest thereof. The defendant, on a bill of exceptions, moved for a new trial.

H. Swift, for the defendant.

W. C. Hasbrouck, for the plaintiffs.

By the Court, COWEN, J. Several exceptions were taken on the trial of this cause, to the decisions of the judge, in admitting and denying evidence.

1. He excluded *parol* evidence, offered by the defendant to show the [*423] plaintiffs' agreement with the makers that they "should have time for payment. It is true that the giving of the bond, warrant and specification, was sufficient consideration for the agreement, and there is nothing in its own nature to prevent its being by *parol*. After a promissory note is made and endorsed, the holder and maker may, without writing, stipulate on a proper consideration, to enlarge the time of payment, and such stipulation will have the effect to discharge the endorser. The answer here is, however, that they have not chosen to speak orally, but by writing; by a bond and warrant sealed on one side, and a writing fixing the terms of the agreement on the other; this being signed by both parties. It declares that the bond and warrant were to secure the payment of the note in question in this case, and two other notes if a balance should remain for that purpose after exhausting two previous classes of debts, the bond being payable presently. Whether the specialty on one side and the unsealed specification on the other constituted only one, or two agreements, they were com-

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plete in themselves'; they were mutual, the makers binding themselves to pay, and the obligees to apply the proceeds in a certain order. The whole was in writing, the one standing as the consideration of the other: and the evidence offered of an *oral* agreement to enlarge the time was but another phrase for enlarging or adding to the written agreement as it stood on the side of the obligees. This was clearly inadmissible. The rule that parol evidence cannot be received in such a case for such an object, with its qualifications, may be collected from the cases cited in *Cowen & Hill's Notes to 1 Phil.* 1470, and a few following pages.

2. It was assumed by the judge that an execution of the bond and specification by the makers, in consequence of a *misreading*, would avoid the specification. That would leave the judgment to stand good, and make the avails of the sale under the execution applicable to the several demands mentioned in the specification, independently of its provisions. It could not avoid the judgment; but that being *ex parte* and incomplete, its object would be left open to explanation, according to the truth, by such evidence as the defendant had within his reach. I see no objection in such a case to his connecting the judgment with its subject matter by parol evidence. Looking at the bond and record, it is ambiguous whether they were for a new debt, or intended of those mentioned in the specification; and then whether as a satisfaction or collateral security, rateably or in a certain order. Such an ambiguity may, in its own nature, be removed by written or parol evidence. The evidence offered and received was, in effect, first to avoid the written appropriation, and then to substitute the oral arrangement. The first being out of the way, there was room for the latter. An agreement between the debtor and creditor, fixing the mode of appropriation, controls the right of the creditor. We think, therefore, the judge was right when he let in evidence of the fraud and the oral agreement. The latter was material, as auxiliary to the evidence of fraud, and should the jury find this, then as giving a direction to the credit of the money to be levied. The fraud would not, as contended by the defendant's counsel, have opened the whole transaction, judgment and all, thus leaving the avails afloat, perhaps recoverable back by the makers, on the ground of the wrong. That might indeed have been so, had the judgment been directly assailed by a successful motion to set it aside. Till such a motion was made, however, the judgment was itself valid against the makers, however fraudulent. Its purpose was alone sought to be rectified; and that only could be rectified in this collateral way. The makers had no objection to the judgment. Its object alone was contested. In this view, the actual oral agreement became material; and it follows, that every circumstance going to confirm or repel the proof brought forward to establish it was admissible.

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3. One of these circumstances was the interview between Vassar and Williams. Williams testified that, at a proper time, after he had discovered the fraud, he remonstrated with Vassar, the plaintiff's agent. This conduct was very natural for a man who had been imposed upon, and being true, would tend to give him credit with the jury. Vassar, a witness for the plaintiffs sworn in reply, had heard him speak of this on the stand, [*425] and was very properly, "therefore, inquired of as to its truth.

The form of the question, as being a leading one, was not made a ground of objection. His happening to hear the testimony, certainly did not disqualify him. That could not have been made even a plausible point, without his having been ordered out of court while Williams was testifying. He and Vassar stood in direct contradiction on the two leading facts, the agreement for rateable distribution, and fraud in misreading a stipulation intended, as Williams said, to provide for it. Every fact, therefore, detracting from Williams' credit, was admissible, and there was nothing arising from the relative positions in which the two witnesses stood, which rendered Vassar incompetent more than another to deny the alleged interview. Indeed, where witnesses conflict as to a conversation between themselves, there is in some cases considerable advantage in both being present face to face, hearing and explaining to one another upon the stand.

4. In the course of the negotiation which resulted in the bond and judgment, Thomas Williams had, by the request of Vassar, furnished a statement of his affairs. And he was questioned in the course of his cross-examination with an evident view to impeach its fairness and veracity ; whether successfully or not, was, I think, entirely immaterial, for I have been unable to see that it had the remotest relevancy to the matter in hand. It was, so far an effort to turn the tables upon the witness, by showing an attempt on his side, through a fraud on the bank, to call out farther advances. All the bearing it could have had upon his credibility was no more than an insulated falsehood, not under oath, uttered years before, in regard to any other matter. It would neither weaken nor confirm the evidence as to fraud in the misreading by the bank agents, or the oral agreement, which by the misreading was sought to be evaded. When, therefore, at an ulterior stage of the cause, one party offered to show the truth and the other the falsity of the statement, the judge was under no obligation to hear the evidence offered on either side. It does not follow that, because irrelevant testimony has been given on one side; though without objection, the other has a right [*426] to give "evidence in reply. Nor is a court bound to hear irrelevant evidence by consent of parties. See the cases collected in *Cowen & Hill's Notes to Phil. Ev.* p. 430, et seq. Also, *Prevost v. Sim-eon*, 4 *Mill. Lou. R.* 472, 475 ; *Wilkinson v. Jett*, 7 *Leigh*, 115, 117 ; *Jewett v. Stevens*, 6 *N. Hamp. R.* 80 ; and *Hamblett v. Hamblett*, *id.* 833,

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342. The result of the cases would seem to be that where immaterial evidence is received, or evidence to an immaterial point, a new trial will not be granted, whether the judge allow further evidence on the same subject or not.

Although the judge properly cut off all farther inquiry into the truth or falsehood in Thomas Williams' statement of affairs, he allowed the jury to take it with them when they retired for the purpose of deliberating on their verdict. The submission of the paper in that way to the jury, was, we think, equivalent to its admission *as evidence* in the cause. What use the jury may have made of it, we cannot say. It had been examined to by the plaintiff's counsel, with what effect in the mind of the jury it is also impossible to determine. Perhaps they thought it impeached. Its relevancy was not pointed out at the bar ; and we have not been able to discover that it had any bearing whatever. So thought the judge, or he would not have cut short all farther proof concerning its truth or falsehood. Yet he suffered it to be taken by the jury, as a part of the plaintiff's evidence. It is hardly necessary to inquire whether, supposing it to have been admissible, such a course was correct ; for we think it impossible, to uphold a verdict which may have resulted from allowing the jury to take with them as evidence a paper confessedly foreign to any of the matters in issue.

It was surmised onthe argument that, the paper being *immortal*, we must presume that the jury allowed no weight to it. The argument assumes that enough is to be seen in the case without it to warrant the jury in finding as they did. That we cannot say. I apprehend the case before them was so balanced that, finding either way, we should hardly have disturbed their verdict as contrary to the weight of evidence.

*Again ; this argument assumes that we are deciding on a *case* ; [*427] whereas the question comes before us on a *bill of exceptions*, and we are bound to inquire what we should say as a court of error. If we believe that the court of dernier resort would set aside the judgment, what use in denying a new trial ? The distinction is wide between a *case*, whereon we have ^a discretion, and a bill of exceptions which we are bound to try as a step to a higher court. That court has no right to examine the weight of evidence in order to answer that the improper testimony was harmless. If the party objecting have done any thing to waive or take from the force of his objection, that is one thing ; his exception then ceases to exist. But so long as he insists upon it, he is entitled to his neat point, on error, that the testimony was irrelevant, whether the court are disposed to guess it may have weighed but a feather or even made for the party excepting. If they see that it must necessarily have tended in his favor ; if it made for him in its own nature, or could not possibly prejudice his case, that might be an answer : but so long as the chance is equal that it may have had some effect one way or the other, the party is entitled to the benefit of the principle

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that irrelevant testimony should be shut out from the jury. Above all, if it go to them, should he have a chance to set it right by explanation. Even that was withholden. The plaintiffs had their chance on an impeaching cross examination ; all reply was denied, for the very reason that the paper was impertinent, and yet, on their own motion, it finally passed to the jury.

It is vain in the nature of things, however, to admit speculation on a bill of exceptions, or on error, whether the impertinent proofs may or may not have weighed injuriously in the scale. Such a principle will often load bills of exceptions with the whole evidence as if they were cases. The offices of the too will be confounded in those respects wherein they must be kept distinct, unless we are prepared to turn our courts of error into courts of general appeal. I am, by no means, sure that the distinction has always

been attended to when bills of exceptions have come to be considered [*428] in this court, on their way to the court of errors. "I am quite sure, however, that the omission must have arisen from overlooking, not with an intention to repudiate so obvious a distinction. See the cases in *Cowen & Hill's Notes to Phil.* p. 787, 8.

But with regard to the objection in a more general view, and supposing the statement in question to have been receivable as evidence, it is by no means clear that the jury were entitled to take it out with them, though they had the sanction of the judge. Mr. Graham, in his Treatise on New Trials, p. 80, says the practice in this state is not to allow the jurors to have the papers produced in evidence, without the consent of parties ; though he thinks this should be referred to the sound discretion of the judge. The question is less what the practice should be when considered *a priori*, than what it is as collectable from books of authority, the proofs of the common law. These are decidedly against the practice as a general one. It was denied for law in the first edition of *Gilbert's Evidence*, A. D. 1756, pp. 17 to 19, with certain exceptions as to exemplifications and deeds under seal. The reason given was that both had intrinsic evidence : even the seals of certain families being known to the jury of the vicinage. The latter reason has ceased to operate both from a change of practice in respect to the devising of private seals, and the constitution of juries, who are now taken by lot from the county at large. The same rule was repeated with the same qualifications in Mr. Loftt's edition of Gilb. in 1791, 1 vol. p. 21. Judging from the later treatises, and the reports, as far as I recollect, the practice of leaving papers with the jury at all, seems to be pretty much discontinued in the English courts. The question was judicially considered in *Olive v. Guin*, A. D. 1656, 2 Sid. 145, and the rule laid down with the limitations as found in Gilbert. The same rule is laid down, 2 *Trials per pais*, 366, Lond. ed. 1766, and by *Buller, J.* in his *N. P.* p. 308, 5th ed. The evidence of the law as it stands upon authority and practice seems to be all one way ; and

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that is against loading the jury with papers which they often will not understand, and sometimes perhaps, cannot even read. As a general rule it seems *much safer that the contents should be communicated [*429] to them only by counsel in presence of the court. A parcel of papers among a dozen men, however intelligent, can hardly ever be properly examined and appreciated. The effect upon the verdict is another matter. Even if improperly allowed to go to the jury, where it appears affirmatively and clearly that they have worked no prejudice, the verdict, perhaps, would not be set aside on a *case*. But it is not necessary to pass definitely on the general question. For the reasons before given, there must be a new trial.

COWDEN *vs.* WRIGHT.

In an action of *trespass* by a father for assaulting and beating his son *per quod servitium amisi*, a jury, in assessing the damages, are not authorized to take into account the wounded feelings of the parents.

ERROR from the Genesee C. P. Wright sued Cowden in an action of trespass for assaulting and beating her son, *per quod servitium amisi*. Cowden was the teacher of a select school, and the plaintiff's son was one of his scholars, and the beating complained of was by way of punishment for disorderly conduct. The court, among other things, charged the jury that in making up their verdict they might take into the account *the feelings of the parents* occasioned by the infliction of the punishment of their son. To which the defendant excepted. The jury found a verdict for the plaintiff with \$75 damages. Judgment having been entered upon the verdict, the defendant sued out a writ of error.

C. P. Kirkland, for the plaintiff in error.

J. A. Spencer, for the defendant in error.

By the Court, NELSON, Ch. J. I think the court erred. The foundation of the action is the loss of service, and the *expense [*480] and trouble the parent is subjected to in taking care of his child.

It is true, that in the action for the seduction of a daughter, the jury in fixing upon the damages may regard the wounded feelings of the family; but that case has always been considered *sui generis*, and inconsistent with the fundamental principle of the action. Besides, there is a marked distinc-

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tion between that and the present case. There the only remedy for the injury is the action by the parent; the daughter is without redress, however aggravated the seduction. It is not therefore surprising the courts should have been indulgent in the measure of damages in the particular case. But here the child may also maintain an action against the defendant, in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the gravamen of the suit. Full opportunity is here afforded to inflict upon the wrongdoer punishment in proportion to the aggravation of the assault. The two remedies, one in behalf of the parent, the other of the child, seem to me sufficiently liberal, when taken together, upon the principles above stated; certainly as much so, and more onerous to the defendant, as in the case of the injured party, where the remedy is confined to one action for the assault.

Edmondson v. Machell, 2 T. R. 4, may, I think, be regarded as countenancing the view we have taken. Trespass for assaulting and beating the plaintiff's niece, *per quod*, &c. was brought by the aunt, and at the same time another action was brought by the niece for the same assault. The counsel for the aunt, on the trial, withdrew the record in the latter case, and declared their intention not to try it. The defendant insisted that the jury could only give damages for the loss of service; the court ruled otherwise, and placed the case on a footing with the action for seduction. On a motion for a new trial, it was admitted the damages were not excessive, if the jury had a right to take both actions into their consideration; and the court, on the niece stipulating not to proceed in her action, refused to [*431] grant a new trial. But it is obvious, from the report of the case, the result would have been different without this stipulation: in effect, I think, denying the analogy to the suit for seduction.

Judgment reversed; *venire de novo*; costs to abide event.

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THE PEOPLE vs. THE PHœNIX BANK.

Where, by the act of incorporation of a banking company, the legislature reserve the power of annually appointing one of the directors of the institution, and an information in the nature of a quo warranto is filed against the company for a misuser, an appointment of a director by the governor and senate subsequent to the filing of the information is not a waiver of the forfeiture. The legislature alone can waive such forfeiture.

INFORMATION in the nature of a quo warranto against the defendants for claiming to be and acting as a corporation. The information was filed March 25, 1838. The defendants pleaded the several acts of the legislature by which they were created and continued a corporation. They were



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originally incorporated by the name of the *New-York Manufacturing Company*. *Statutes of 1812*, p. 509. The affairs of the company were to be managed by fifteen directors, of whom the stockholders were to choose all but one, who was to be appointed annually by the council of appointment, in behalf of the state, and was to hold his office for one year, and until another should be appointed in his stead. § 3, 5. The corporation subsequently took its present name, *Statutes of 1817*, p. 30, § 4; and in 1831, the charter was extended until 1854, and the company was subjected to various provisions of the revised statutes, and to the safety fund law. *Statutes of 1831*, p. 28.

The attorney general put in sixty-two *replications*, each of which alleged that the defendants had taken *usury* on making a loan or discount in the course of their business as bankers. The acts were alleged to have been done in the years 1836 and 1837.

On the 19th March, 1840, the defendants *rejoined*, that "on [*432] the tenth day of that month, William B. Townsend was by the governor and senate nominated and appointed a *director* of the company in the place of James Campbell, whose term of office had expired; that he was commissioned, and had entered on the duties of his office. Verification, &c. The attorney general *demurred*, and the defendants *joined in demurrer*.

S. A. Foote & Willis Hall, (attorney general,) for the people.

D. Lord, jun. & J. Prescott Hall, for the defendants.

By the Court, BRONSON, J. No question has been made upon the sufficiency of the *replications*. The case, then, comes to this: the attorney general alleges that the defendants have forfeited their corporate privileges by taking *usury*. The defendants answer, that a state director has since been appointed by the governor and senate; and this act, they insist, amounts to a waiver or pardon of the forfeiture. The conclusion does not follow from the premises.

No one could take advantage of the forfeiture in a collateral manner. It could only be asserted by a direct legal proceeding on the part of the government to dissolve the corporation. Notwithstanding the existing cause of forfeiture, the defendants were a corporation *de facto*, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the mean time, it was the duty of the governor and senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a state director was, therefore, perfectly consistent with the intention to continue this prosecution, and insist on the forfeiture.

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Should it be conceded that the governor and senate had a dispensing power, it does not appear that the power has been exercised. We are not authorized to follow the suggestion of the defendants' counsel, and assume that the appointment was made for the purpose of waiving the forfeiture. [*433] There is no such allegation in the rejoinder; and besides, we cannot shut our eyes to the fact that there was another and a sufficient ground for the exercise of the appointing power. Indeed, if the public officers believed that the defendants had violated their charter, they had a cogent reason for making the appointment, to the end that there might be one director in the board to watch over the public interests until the forfeiture could be asserted, and the corporation dissolved in the forms prescribed by law.

Enough has been said to dispose of this case. But I must not be understood as admitting that the governor and senate, without the concurrence also of the assembly, had any dispensing power. They had no more authority to waive or pardon the forfeiture than any other public officer or body of men. Indeed, the attorney general had more power over this matter than the governor and senate united; for if he refused to prosecute, the wrong charged upon the defendants would go unpunished, and the corporation would continue to exist and enjoy its privileges in the same manner as though there had been no violation of the charter. Still, the neglect to prosecute would not amount to a pardon; it could only operate as a waiver so long as the omission continued, and would be no answer to a *quo warranto* whenever he, or his successor in office, might choose to insist on the penalty.

In England, where corporations may be created by royal charter, the king can pardon a forfeiture, by granting restitution; but he has, I think, no such power in relation to corporations created by act of parliament. *The King v. Amery*, 2 T. R. 568, 9. *Newling v. Francis*, 3 id. 189. *The King v. Miller*, 6 id. 277. So, here, where corporations are created by the legislature, that body can waive the forfeiture, by ratifying and confirming the original grant. *The People v. The Manhattan Company*, 9 *Wendell*, 351. But no other body of men has any such dispensing power. The franchise is granted upon condition that it shall become void in case of misuser; and although the corporation will continue to exist until the forfeiture is asserted in the forms prescribed by law, the condition [*434] can only be changed, or the penalty released, by the power which made the original grant. The legislature may, perhaps, delegate its authority to pardon the offence; but that has not been done.

The rejoinder does not show that any act has been done which is inconsistent with the assertion of the forfeiture; and if it were otherwise, the governor and senate, without the concurrence of the assembly, had no dispensing power.

Judgment for the people.

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COOPER *vs.* STONE.

A publication commenting upon a printed work is *libellous* which imputes to the author a disregard of justice and propriety as a man, represents him as infatuated with vanity, mad with passion, and the apologist from force of sympathy of another stigmatized with ingratitude and perfidy; and which also charges him with publishing as true, statements and evidence falsified, and encomiums retracted. So HELD on *demurrer* to a declaration, the court ruling that the defendant could not on demurrer claim his communication to be *privileged* as a legitimate criticism; the question of privilege solely appertaining to a *jury*.

DEMURRER to declaration for libel. The declaration states that the plaintiff is the author of numerous books, and among the rest of a certain book called "Home as Found," and of a certain other book called "The History of the Navy of the United States of America," both of which, before the committing of the grievances by the defendant hereinafter mentioned, were printed and published; and which last mentioned book contains among other things a true, honest and impartial narrative of the principal occurrences of the engagement between the British and American squadrons on Lake Erie during the last war between the United States and Great Britain, in which engagement *Oliver H. Perry*, then an officer in the navy of the United States, commanded the American squadron, and *Jesse D. Elliott*, then and now an officer in the navy of the United States, command-

ed one of the vessels of the American squadron called the "*Niagara*;" yet that the defendant well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into general contempt, disgrace and infamy, and to cause it to be suspected and believed that the plaintiff had intentionally and from unworthy and base motives, falsified and misrepresented historical facts in the narrative of the engagement between the British and American squadrons on Lake Erie, contained in the history of the navy, &c. on the 8th June, 1839, at, &c. falsely, wickedly and maliciously published, in a newspaper called the "New-York Commercial Advertiser," of which he is the editor, a false, malicious and defamatory libel, of and concerning the plaintiff, and of and concerning the history of the navy of the United States of America, and the narrative therein contained of the engagement between the British and American squadrons on Lake Erie. The plaintiff then set forth with proper innuendoes the following libel: "Cooper's Naval History. Although the same courtesy has not been extended to us in regard to this book by its publishers which we uniformly experienced from them on similar occasions, before we committed any criticisms upon Mr. Cooper or his works, and what we have since continued to experience with respect to the works published by them of other authors—yet we felt so much interest in the subject as to induce us, notwithstanding this neglect, which as we do not

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impute it to the worthy booksellers, is upon the whole rather flattering—to obtain this last work of Mr. Cooper's in spite of his prohibition, and to give it early, deliberate and candid perusal. Little as we owe to the author on the score of personal consideration, and great as had been our disappointment from many of his late publications, the expression of which had, as we found, provoked his resentment, we still cherished the hope that with the elevated theme he had now chosen, he would rise above the personal feelings and political prejudices that disfigure those of his preceding works to which we have alluded. We had hoped that on this occasion Mr. Cooper—to use

a sea phrase as he does, in a sense that a seaman never used it in
[*436] —would “go aloft” instead of remaining “in the cockpit.” We

even believed it possible, that finding the subject congenial with his early tastes and pursuits, he would, if not animated by it to the noblest efforts, at least avoid the rocks and quicksands, which had already well nigh made shipwreck of his reputation as a writer, and regain a footing upon that strand, whence he first launched his gallant little bark upon a sea which, to young and rash adventurers, especially if they belong by nature as well as by profession to the *irritable genus*, is apt to prove a “sea of troubles.” We must confess, however, that we were not without some misgivings. We had heard it rumored that the Naval History of the United States was to contain, if not a vindication of the conduct of Captain Elliott in the action on Lake Erie, at all events a much more favorable view of it than had been presented to the public by his commanding officer, the late Commodore Perry. But with all our experience of the waywardness, inconsistency and love of paradox which had distinguished the author of “Home as Found,” we could hardly persuade ourselves that he had become so utterly regardless of justice and propriety as a man, so callous to the perceptions of good taste as a writer, so insensible to his obligations and responsibility as a historian, and so reckless of his character as a public candidate for literary distinction and immortal fame, as to forego and disregard the opportunity of retrieving in some degree the reputation and standing which he must have been conscious of having lost. We were certainly not prepared to find that the infatuation of vanity or the madness of passion could lead him to pervert such an opportunity to the low and paltry purpose of bolstering up the character of a political partisan, an official sycophant, and to degrade the name and object of history in a work claiming by its title to be national in its design, by salving the wounded reputation of an individual who, from the time of the transaction referred to by his apologist, has been regarded as one doing at best but doubtful credit to his profession—and who owes his continuance in the service, after the events of that day, solely to the forbearance and magnanimity of his superior, which he subsequently requited with ingratitude
[*437] and perfidy. We have indeed been disappointed, however faint

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were our hopes ; and we acknowledge that we were deceived in our estimation of the discretion, taste, judgment, tact and sensibility of Mr. Cooper, however doubtful we had felt as to his possession of any one of these qualities. But we must console ourselves with the reflection, that the power of sympathy is sometimes irresistible. Not content with leaving the character and conduct of Captain Elliott where his gallant commander was content to leave them—to be judged by the official report of the engagement, in which most assuredly he distinguished himself—his advocate, by travelling beyond that record and ascribing to him at least an equal meed of glory with that which as a historian he assigns to Captain Perry, has but repeated the insane attempt which his hero had before resorted to—of provoking an enquiry. But the patron is worthy of his client. Neither of them, it seems, was satisfied to let the cause rest upon the documentary evidence ; and both of them, we suspect, will live to repent their indiscretion. We had supposed that such had long been the case with the latter, but the zeal of his apologist affords evidence of a relapse. Can either of them have forgotten the exposure extorted some eighteen years ago from Com. Perry and his friends ? As to Captain Elliott, anxiously as he may have desired it, he must have found it impossible. But perhaps both he and his defender have imagined that the memory of the public was not so tenacious. The latter cannot be allowed to plead ignorance, as all the documents relative to the subject are to be found on the files of the Navy Department, to which he had access. The conduct, therefore, both of the author and of the actor on this occasion, can be accounted for only on the supposition that *quem Deus vult perdere prius dementat* ; and our readers will be better enabled to decide upon the justice of applying to them this familiar adage, by the extracts which we shall hereafter give from some of these documents.”

The declaration contains a second count, setting forth another publication in the New-York Commercial Advertiser, which appeared on the 19th June, 1839, in these words : “ But Mr. Cooper, who has long been regarded as his own worst enemy, has on this occasion proved himself the worst enemy also of his friend. After the lapse of eighteen years he has thought proper to revive the memory of events which “ for the reputation and interest of that friend should have been buried in oblivion—and after a whole generation nearly has passed away, and many of the witnesses of the transaction had gone with it, he has deliberately penned an account of it, intended for posterity, from the statements of Captain Elliott and the evidence of his witnesses, and quoted in their support the official encomium of Com. Perry, without affording the least hint or intimation to the readers of his history that the former had been falsified, and the latter retracted. Unfortunately for his purpose, but most providentially for the fame of one of the most able and gallant of our naval heroes, he was provoked in

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his lifetime to perpetuate the testimony which we have now adduced, to vindicate his conduct—not from the aspersions of a malignant rival, for his envenomed shafts had fallen harmless from the panoply of truth and honor in which the character he assailed was armed—but from the partial and deceptive representations, and the gratuitous and insidious defence of one who has assumed the office and responsibility of a historian, and hopes that his work may be appealed to as an authentic record, by future generations and to the latest age. It shall not be our fault if the bane be not accompanied by the antidote.” The declaration then concludes in the usual form.

The defendant put in a separate demurrer to each count of the declaration, and the plaintiff joined in demurrer. The cause was argued by

R. Cooper, counsel for the plaintiff, and by the plaintiff *J. Fenimore Cooper* in pro. per.

C. P. Kirkland & M. J. Bidwell, for the defendant.

By the Court, COWEN, J. The matter as set forth in either count is denied by the defendant to be libellous. It is alleged to be ‘false [*439] and malicious, and to have been published “by him with intent to injure the plaintiff and bring him into general contempt, disgrace and ignominy. These allegations are admitted by the demurrer; and the question is whether the matter necessarily had the tendency imputed to it by the pleader. The declaration recites that the plaintiff was the author, among other and previous books, of *the history of the navy of the United States*, the latter containing a true and impartial narrative of the battle of Lake Erie; and avers that the libels were published of and concerning this part of the history, and of and concerning the plaintiff. One object of both is obvious. It was to impeach the truth of the narrative as being less favorable to Commodore Perry than his conduct on that occasion called for; and more so to Capt. Elliot, who was a subordinate officer engaged in the same battle.

The libel in the first count, speaking in reference to the general subject of the history, and especially the favorable point of view in which it places the conduct of Capt. Elliot, alludes to a hope entertained by the defendant, that the plaintiff would, in his history, have risen above the personal feelings and political prejudices by which his preceding works had been disfigured. It speaks of a rumor that the history was to contain a more favorable view of Capt. Elliot’s conduct, than had been given by Com. Perry at the time; but the defendant could hardly persuade himself that the plaintiff had become so utterly regardless of justice and propriety as a man, so insensible to his obligations and responsibility as a historian, &c. as to forego the chance of retrieving the reputation he must have been conscious of having lost. The

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defendant was not prepared to find that the infatuation of vanity or the madness of passion could lead the plaintiff to pervert such an opportunity to the low and paltry purpose of bolstering up the character of a political partisan, an official sycophant; and to degrade the name and object of history, by salving the wounded reputation of one who had been regarded as of doubtful credit in his profession; one who, after the events of the battle, owed his continuance in the service to the forbearance of Com.

Perry, which he recquited with ingratitude *and perfidy. The [*440] defendant then says he had indeed been disappointed; but must be consoled that the power of sympathy is sometimes irresistible. The patron is worthy of his client. Perhaps both Capt. Elliot and his defender had underrated the memory of the public. The plaintiff could not be allowed to plead ignorance as all the documents relative to the subject were to be found on the files of the navy department, to which he had access.

We are thus presented with a series of remarks distinctly imputing to the plaintiff a disregard of justice and propriety, an insensibility to his obligations as a historian, the infatuation of vanity, the madness of passion, and low and paltry purposes. They present him as holding an affinity, and standing on a level with, and vindicating and bolstering up the character of an official sycophant, an officer unworthy of his place, a man guilty of ingratitude and perfidy. With such a man the sympathy of the plaintiff is represented to be irresistible, the patron as worthy of his client; and finally, the plaintiff is accused more directly, of palming falsehood upon the world in the name of history.

The slander is somewhat diluted, by being mixed up with a small portion of what may perhaps be legitimate commentary on that branch of the history in which it professes to have found aliment for its grossness. The defamatory matter is, however, easy of extraction, and, when concentrated, fully answers to the definition of a libel upon a private person. This definition may be found in any book which treats of the subject. It means a contumelious or reproachful publication against a person; any malicious publication, tending to blacken his reputation, or expose him to public hatred, contempt or ridicule. *Vide 2 Pick. 115, per Lincoln, J.*

In the second count the defendant represents the plaintiff as deliberately penning an untrue account of the battle, intended for posterity, and derived from evidence which had been falsified or retracted, without the least hint or intimation of the latter. The defendant speaks of its being unfortunate for the plaintiff's purpose that Commodore Perry had himself disclosed the truth; and declares that the *defendant adduced the [*441] statements of Commodore Perry to vindicate him from the partial and deceptive representations, and the gratuitous and insidious defence instituted by the plaintiff, who had assumed the office and responsibility of a

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historian. The libellous matter set forth in this count is less extended and less loaded with epithets than the first. It is, however, sufficiently obvious. It charges the plaintiff with falsehood, an imputation which, when published in a written or printed form, has been held libellous ever since *Austin v. Culpeper* was decided, in 35 *Car. 2, Skin.* 123. The case of *King v. Lake*, is there mentioned wherein it was adjudged that, to say of a man in a petition printed and published, that he is an unjust man, is slanderous, and an action lies; and the judgment in that case was affirmed on a writ of error. *Skin.* 124. By way of illustration, the court remarked, that merely to say of a man he is dishonest, is not actionable, yet to publish so, or put it upon the posts is actionable. *Id.*

Assuming the articles to be libellous in themselves, the only answer given on the argument was, that the plaintiff appearing by the declaration to be an *author* and the defendant an *editor*, and the libel treating of the plaintiff as an author, it is thus on the face of the declaration shown to be a publication absolutely privileged. To maintain this position, *Carr v. Hood*, 1 *Campb.* 354, note, was relied upon. That case was tried at *nisi prius*. The plaintiff complained that he had been personally slandered, under the pretence of reviewing his works; and it was put to the jury that if the criticism were fair and just, and reflected upon the plaintiff's character no farther than it was truly presented by his works, the defendant was justifiable even though he had ridiculed the plaintiff. It is unnecessary to pronounce whether that case may not have gone too far, because no one will pretend that the privilege of the press can warrantably be perverted to the purposes of wilfully and falsely assailing the character of any man. To say that he is an author, editor, or reviewer, is but saying that he is engaged in a profession which has been and may be made eminently useful to mankind, and which would

[*442] therefore seem to call for peculiar protection and encouragement.

That the law should allow his productions to be criticised with great freedom, is not denied. If he has made himself ridiculous by his writings, he may be ridiculed; if they show him to be vicious, his reviewer may say so. But the latter has no right, therefore, to violate the truth in either respect. The difficulty of sustaining this demurser lies in its admitting that the plaintiff's moral character has been falsely and maliciously assailed by the defendant. This being imputed in the declaration, it behoved him to show that what he said was true, or at least that it was no more than a fair deduction from the plaintiff's works. The question is one of good faith. It is always so in case of the highest and most absolutely privileged communications. The claim of privilege can therefore be settled only by a *jury*. I do not speak of criticism upon the works of an author in the abstract; for this I admit no action can lie. Certainly not, unless the criticism be grossly false and work a special damage to the proprietor of the book at

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which the strictures are levelled. The book cannot be plaintiff. I speak of attacks on the moral character of the author ; and I will not stop to weigh the argument which would disfranchise him, because he happens to be an author.

This is, I believe, the first attempt to try the question of privilege by a demurrer to the declaration. Something was said on the argument, of the declaration failing to point and apply the imputed slander by proper explanations. This is never necessary where the words are plain in themselves. It is difficult to read the articles as set forth in the counts without seeing at once that they are direct and undisguised attacks upon the moral character of the plaintiff by name.

Judgment for plaintiff on demurrer, leave, &c.

*JACKSON, ex dem. Genet and others *vs.* Wood.

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Since as before, the revised statutes, a plaintiff in ejectment is entitled to recover *mense profis* only for the period of six years; and now he is limited to that period, although the *statute of limitations* be not pleaded.

In ascertaining the *mense profis* or the rents of premises situate in the city of New-York, *interest* may be computed upon rents from the expiration of the quarter-days, instead of the expiration of the year.

MENSE profits in ejectment. In May term, 1835, the plaintiff recovered judgment in this court in an action of ejectment brought for the recovery of certain premises situate in the city of New-York, which judgment was affirmed in the court for the correction of errors on the 30th December, 1837, and the proceedings remitted to this court. The plaintiff thereupon made a suggestion upon the record that he claimed from the defendant \$20,000, in which sum he alleged the defendant was indebted to him for the use and occupation of the premises specified in the first count of the declaration in ejectment, from 16th March, 1818, until 4th May, 1835, when the judgment of this court was rendered, during all which time, the plaintiff alleged, the defendant enjoyed the *mesne profits* of the premises recovered, the value of which profits he alleged amounted to the said sum of \$20,000, and then set forth a promise. The plaintiff also claimed \$5000 for the use and occupation of the premises from 4th May, 1835, to 1st March, 1838, during which time he was delayed in having execution by the prosecution of the writ of error. Similar suggestions were made under other counts in the declaration in ejectment. The defendant pleaded *non assumpsit* to the suggestions, and gave notice with his plea that on the trial of the cause he would prove that during his occupation of the premises he had made perma-

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nent improvements to an amount equal to the plaintiff's claim. The cause was heard by *referees*, who made a *special report*, that if the plaintiff was entitled to recover mesne profits from 1st March, 1822, the day [*444] when the defendant went into possession of the "premises, the sum due to the plaintiff was \$13,800: but if the plaintiff was only entitled to recover *for the period of six years* next before the rendition of the judgment in this court in the action of ejectment, and *for the period of two years and seven months* thereafter, during the pendency of the writ of error, then the sum due to the plaintiff was \$7,289,04. The referees also reported that they had *computed interest upon the rents* from the expiration of each quarter-day, and that if the court should be of opinion that the interest should be computed from the expiration of each year, and not from the expiration of each quarter-day, then the above sums should be reduced, in the one case to \$13,509, and in the other to \$7,159,04.

S. Stevens, for the plaintiff, on the coming in of the report, moved for judgment for the largest sum specified in the report.

J. Slosson and B. F. Butler, contra.

By the Court, NELSON, Ch. J. The important question in the case is, whether the plaintiff is entitled to recover for mesne profits beyond six years.

Before the revised statutes, it was well settled, that in the action of trespass, the claim could not be extended beyond that length of time before commencement of the suit. *Bull. N. P.* 568. *Saund. Pl. and Ev.* 668. *8 Wendell*, 599. *13 Johns. R.* 50. But it was necessary to plead the statute of limitations.

A suggestion upon the record of judgment in ejectment is now substituted *in lieu* of the action of trespass. *2 R. S.* 236, § 44, 54. And it seem reasonable to conclude, unless there is something in these provisions extending *the time* beyond which a recovery could formerly be had, that the old rule in this respect was not intended to be altered. The reasons for the limitation are as applicable to the new as to the old remedy. But we are not left to construction or conjecture as to the intention of the legislature; for the 50th section declares that the plaintiff shall not be entitled [*445] *to recover the rents and profits of the land recovered, for any longer term than six years.*

It has been argued that this was intended to limit the right to mesne profits which had accrued previous to the commencement of the ejectment; that the suggestion is but a *continuation* of that suit, and therefore carries the claim, as of course, back to that period. This statute remedy is supposed

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ed to be analogous to the one in the old action of ejectment, in which damages were recoverable. I see nothing in the provisions of the statute warranting this view. The principle contended for is entirely new in this state, and if the legislature had intended to engrave it upon our law, it is but reasonable to suppose, they would have distinctly put it forth. For a long time, perhaps soon after the plaintiff was allowed to recover the term in ejectment, it has been regarded as an action for the trial of *the title only*, and the damages were merely nominal. *Selw.* 510, 567. *Van Alen v. Rogers*, 1 *Johns. Cas.* 283. *Bull. N. P.* 88. 2 *Bacon*, 437. The case of *Van Alen v. Rogers* shews that as early as 1800, the action of ejectment was thus understood by this court. Very express provisions, therefore, might be expected, if it had been intended to revive this long exploded practice.

It is also apparent from the provisions preceding the 50th section, that the restriction was intended to limit the recovery to the six years. They prescribe the mode in which the issue shall be formed in pursuance of the suggestion, and the principles that shall govern the trial. The plaintiff is required to establish, and the defendant may controvert the time when he entered into possession, and during which he enjoyed the mesne profits, and the value thereof; he may set off permanent improvements, &c. The 50th section then follows, declaring the plaintiff shall not be entitled to recover the rents and profits for a longer term than six years, obviously enough referring to the whole time for which a recovery may be had in pursuance of these proceedings by suggestion.

But it is urged if this remedy be intended simply as a substitute for the action of trespass, then the plaintiff is entitled *to [*446] recover for the longest period in this particular case, because the statute of limitations has not been pleaded. This is true, unless the revised statutes have dispensed with the plea in respect to this proceeding. I am of opinion they have. The principle of the 50th section enters into and governs the remedy here given to the plaintiff; it is an express restriction upon him, and forms part of the system. He can no more go beyond it on an objection, than he can recover the mesne profits without complying with the requisites prescribed in the 48th section. The language of the general statute of limitations is altogether different; it refers to the *time* within which the respective actions shall be commenced. This declares the plaintiff shall *not be entitled to the rents and profits for a longer term than six years*; and if we may refer to the revisers' notes, the section was made thus explicit to avoid the necessity of pleading the statute.

As rents in the city of New-York, where these premises are situate, are payable at the usual quarter days, 1 *R. S.* 736, I think the referees, in ascertaining the value of the mesne profits, were warranted in adding to the annual rent, the interest quarterly. So much the plaintiff has lost, and the

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defendant enjoyed, by means of the wrongful possession. The aggregate sum for the six years constitute the exact mesne profits upon the basis of the annual rents agreed upon. I think the plaintiff therefore entitled to judgment for \$7289,04.

Judgment accordingly.

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**BUTLER vs. TUCKER.*

Where one party enters into a contract for the doing of work, and binds himself that the whole shall be done and completed to the entire satisfaction of the other party and of third persons, in an action to recover the price stipulated to be paid for the work, it is necessary to aver in pleading that the work was done to the satisfaction of the arbiters designated in the contract; though it seems the plaintiff need not aver that the work was done to the satisfaction of the other party, and that in respect to that stipulation it would be enough to aver that the work was done pursuant to the contract.

DEMURRER to replication. The plaintiff declared in covenant on sealed articles of agreement, dated October 14, 1837, between the defendant of the first part and the plaintiff of the second part. The plaintiff covenanted to furnish all and singular the granite required for a certain building to be called the *Leake and Watts Orphan Asylum*, to be erected at Bloomingdale, in the 12th ward of the city of New-York, agreeable to the plans and the following specifications, to wit, &c. (giving the specifications,) *the whole to be of the best quality of Connecticut granite, at least equal to the specimen shown to the building committee, and to be cut in the best manner*, and to be delivered at the said building at Bloomingdale, *and the whole to be done and completed to the entire satisfaction of the said first party and of the building committee*, and to be furnished as fast as may be required by the defendant. *For the true and faithful performance of all the covenants and agreements to be kept and performed by the plaintiff*, the defendant on his part covenanted to pay the plaintiff ten thousand dollars, as follows, to wit, \$1100, *when all the ashlar to the top of the sill course is completed and delivered at the building*; further sums were then mentioned to be paid at different stages in the progress of the building, concluding as follows: and \$1600 “*when the whole is completed to the entire satisfaction of the said first party and the building committee as aforesaid.*”

The plaintiff in his declaration averred that he had delivered [*448] at the building *all the ashlar to the top of the sill course*, and alleged for breach of the defendant's covenant that he had not paid the *first instalment of \$1100*.

The defendant, after craving *oyer* and setting out the articles, pleaded in

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his second plea, that the plaintiff did not, according to the covenant on his part, deliver at the building a sufficient quantity of ashlar of Connecticut granite to the top of the sill course, *equal to the specimen* in the articles mentioned, *done and completed to the satisfaction of the building committee* in the articles mentioned. Verification, &c. Third plea, that the plaintiff *neglected and refused* to complete and deliver at the building the ashlar necessary and required to build said building to the top of the sill course, *of the best quality of Connecticut granite, equal to the specimen, &c. and cut in the best manner, and done and completed to the satisfaction of the building committee*, contrary, &c. Verification, &c.

The plaintiff *replied* to the *second* plea that he did, according to the covenants on his part and the true intent and meaning thereof, furnish and deliver at the building *a sufficient quantity* of ashlar of Connecticut granite to the top of the sill course, *equal to the specimen in the articles mentioned*, concluding to the country; and to the *third* plea, he replied; that the plaintiff *did not neglect and refuse* to complete and deliver at the building, &c. following the words of the plea in the conclusion, where, instead of saying, “*done and completed to the satisfaction of the building committee,*” the plaintiff said, *done and completed according to the form and effect, true intent and meaning of the covenant*—concluding to the country. The defendant *demurred* to both replications, and the plaintiff joined in demurrer.

W. S. Johnson, for defendant.

G. Brinckerhoof, for plaintiff.

By the Court, BRONSON, J. Without noticing other points which arise out of these pleadings, it is very evident that the plaintiff is unwilling to make, and go to trial on an averment that he has performed his part of the contract *to the satisfaction of the building committee*. It seems probable that the defendant, as a builder, had contracted to furnish the materials and put up the walls of this public building, to the satisfaction of a committee appointed by the founders of the charity; and as he was bound himself to submit to the decision of an umpire, he adopted the prudent course of inserting a like stipulation when he contracted with third persons for materials or portions of the work. But however that may be, the plaintiff had not agreed to furnish and deliver granite of a particular quality and description, and to execute the work in a specified manner, but he has also stipulated that the whole should be done and completed *to the entire satisfaction of the building committee*. He is bound by his contract. It is not enough for him to say, that he has performed the agreement in other respects, without also alleging, that he has done it to the satisfaction of the arbiters agreed on between the parties. *Worsley v.*

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Wood, 6 *T. R.* 710. *Delaware & H. Canal v. Dubois*, 15 *Wendell*, 89, 90, 92. *Morgan v. Birnie*, 9 *Bing.* 672. *The U. States v. Robeson*, 9 *Peters*, 319. 1 *Chit. Pl.* 312.

The defendant does not set up that part of the covenant which requires the work to be done to *his* satisfaction ; and in omitting to do so, he has acted very properly. As to that, it would probably be enough for the plaintiff to aver, that the work was in all other respects completed in pursuance of the contract ; for if the defendant was not satisfied with such a performance, it would be his own fault ; and, as a general rule, a party cannot insist on a condition precedent when he has himself defeated a strict performance. But when parties fix on an umpire and agree to abide his decision, neither of them, without the consent of the other, can withdraw the question of performance from the common arbiter for the purpose of referring it to the decision of a jury. This doctrine was not much controverted on the argument. But it was insisted, that the stipulation that the work should be done to the satisfaction of the committee, only applied as a condition precedent to the last instalment of \$1600, to be paid when the whole work was [*450] completed ; and that in "this action for the first instalment of \$1100, the plaintiff might recover without averring performance.

This position cannot be maintained. The plaintiff, in the first place, covenants to furnish *all* the granite for the building, of a certain quality and description, and the whole to be done and completed to the satisfaction of the committee. The defendant then agrees, that *for the true and faithful performance by the plaintiff*, he will pay \$10,000, in specified instalments as the building progresses, beginning with \$1100, when the ashlar to the top of the sill course should be delivered, and ending with the last instalment of \$1600, *when the whole should be completed to the satisfaction of the committee.* It will violate no rule of grammar, and is but a reasonable construction of the covenant, to say, the concluding words apply to the whole stipulation for payment, and that performance *pro tanto* by the plaintiff is an essential on suing for any one of the prior, as it would be in a suit for the last instalment. Neither party could have intended that the defendant should pay for materials which would not answer his purpose ; nor did they design to fix on a different standard of performance in reference to the different stages in the progress of the work.

But we must look also to the commencement, as well as the conclusion, of the defendant's covenant. It is *for the true and faithful performance by the plaintiff*, that the defendant agrees to pay. These words alone would make performance by the plaintiff a condition precedent to the payment of the money. 1 *Chit. Pl.* 312, *and cases cited.* The plaintiff relies on *Terry v. Duntze*, 2 *H. Black.* 389. But that case was denied to be law, and two cases in this court, resting on the authority of that decision, were expressly

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overruled in *Cunningham v. Morrell*, 10 Johns. R. 203. The doctrine of latter case has been followed ever since, and is decisive against the plaintiff.

Judgment for defendant.

*LUCE vs. CARLEY.

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Where premises adjoining a river above tide water, are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque filum aquæ*, unless the river be *expressly* excluded from the grant by the terms of the deed.

A license given by the owner of the bank of a river above tide water, to abut a dam built across such river to the bank owned by him, is a perfect answer to a claim of *adverse possession* set up by the party obtaining such license, or by a *purchaser* from him, although the purchase be made *without notice* of such claim.

ERROR from the Cortland C. P. Carley sued Luce in *trespass*, for tearing down part of a *dam* across the *Onondaga river*, by means of which dam the mill of the plaintiff was supplied with water. The plaintiff was the owner of the land on the *west side* of the river, and *Amos P. Granger* (under whom the defendant acted) the owner of the land on the *east side* of the river at the place, where the dam butted on the shore. The river at that point is about ten rods wide, and a portion of the dam destroyed was within thirty feet of the east shore. In 1815 *Parley P. Wood*, who derived his title from one *Barnabas Wood*, was the owner of the *east shore*, and *John Smith* the owner of the *west shore*, and in that year John Smith, by the *license* of Parley P. Wood, extended the dam by continuing it from an island in the river to the *east shore*, a distance of about thirty feet. In 1829, John Smith sold his property on the *west shore* of the river to William Smith and another person, conveying to them a right to the dam, extending the whole distance to the *east shore* of the river, and in 1833 the property thus described came to the plaintiff by sundry mesne conveyances. The plaintiff, since his purchase, used the dam and annually repaired it. On the other hand, Parley P. Wood conveyed his property, in 1832, to Daniel Wood, who in 1835 conveyed it to Amos P. Granger. *Barnabas Wood*, grantor of *Parley P. Wood*, derived his title by deed from J. and S. Currey, bearing date 10th August, 1806. The premises conveyed contained about 300 acres of land. One of the courses in the description of the premises ran to a hemlock stake "standing on the *east bank of the river*, from thence down the river *as it winds and turns*, 24 chains and 94 links, to a hard maple tree," &c.; and the deed from Barnabas

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bas Wood, to Parley P. Wood describes the premises conveyed as “Beginning at a hard maple tree standing on the *east bank of the Onondaga river*,” and then, after giving a course and distance *east*, and another *north*, proceeds as follows: “thence *west* 50 chains and 10 links to the *east bank* of the Onondaga river, (and) thence *south along the Onondaga river* to the first mentioned bounds, containing,” &c. Upon this state of facts the court charged the jury that the possession of the dam by John Smith and William Smith were not adverse to Parley P. Wood and those claiming under him; it was apparent that their possession was conventional and not adverse. But if they (the jury) should be of opinion that the plaintiff, when he bought the mill and dam and went into possession, supposed and believed that he had procured a full and absolute title to the same, as described in his deeds, in good faith and without notice of the parol agreements and understandings between Parley P. Wood and John Smith and William Smith, then the plaintiff’s possession would be adverse, (although the possession of those from whom he purchased was not adverse,) and the deed from Daniel Wood to Amos P. Granger would be void *pro tanto*. To which charge the counsel for the defendant excepted. The jury found a verdict for the plaintiff, on which judgment was entered. The defendant sued out a writ of error.

H. Ballard & J. D. P. Freer, for the plaintiff in error.

W. H. Shankland, for defendant in error.

By the Court, COWEN, J. It is impossible to read the bill of exceptions, without at once concurring with the court below, that, independently of the question of adverse possession in the plaintiff, when Granger, the [*453] defendant’s principal, “took his deed in 1835, he had a complete title to the soil on the east side of the Onondaga river, *usque filum aquæ*. The deed from the Cureys bounded *Barnabas Wood* by a stake and maple tree mentioned in the deed as standing on or near the east bank, the intermediate line running along the river as it winds and turns. It is never thought that monuments mentioned in such a deed as occupying the bank of the river are meant by the parties to stand on the precise water line at its high or low mark. They are used rather to fix the *termini* of the line which is described as following the sinuosities of the stream, leaving the law to say, as the line happens to be above or below *tide water*, whether the one half of the river shall be included, with the islands which lie on the side of the channel nearest to the line described. Where the grant is so framed as to touch the water of the river, and the parties do not expressly except the river, if it be above tide, one half the bed of the stream is included by construction of law. If the parties mean to exclude it, they should do so

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by express exception. Without adhering rigidly to such a construction, water gores would be multiplied by thousands along our inland streams small and great, the intention of parties would be continually violated, and litigation become interminable. In these grants, which bounded each side of the Onondaga river, the earlier proprietors, it seems, understood their rights to be precisely what the common law declared them to be; and when the Smiths desired, in 1814 or 1815, to avail themselves of a dam on *Parley P. Wood's* side of the island, they made application to him for license to extend it, and a full and friendly understanding was entered into by *parol*. The Smiths had leave to extend their dam, and *Wood* was to have the benefit of it for the purposes of such machinery as he might afterwards choose to erect; nay, the Smiths explicitly recognized *Wood's* title to the island, by first offering to purchase it. Failing in that, they submitted, and extended their dam under the *parol* license. Clearly the court below could not do otherwise than hold the Smiths bound by that arrangement. They did not put it too strong to the jury, when they said that any claim of

*title by the Smiths, after thus coming in conventionally under [*454] *Wood*, could not raise an adverse possession as against him or any person claiming under him. That the court below gave the grant to Barnabas *Wood* a construction by no means too comprehensive, may be seen by the late case of *Starr v. Child*, 20 *Wendell*, 149, 156 to 158, and the books cited in that case; and the effect of a clear paper title recognized and acted upon by the Smiths, they taking under it by express agreement the right to run their dam from the island to the eastern bank, was obviously not overrated. They at least were concluded against alleging an adverse possession. *Colvin v. Burnet*, 17 *Wendell*, 564, 568, 9, and the cases there cited. *Hart v. Vose*, 19 *id.* 365. *Parker v. Foote*, *id.* §09. *Butler v. Phelps*, 17 *id.* 642.

We think also that the court were bound to regard the successors of the Smiths as in the same case with them, whether such successors came in with or without notice of the arrangement. The court erred, therefore, in charging that the jury might find an adverse possession in the plaintiff. It is going far enough to say that a squatter, a man presumptively holding in privacy with the true owner, may raise an adverse possession in his grantee by an absolute conveyance. Such an act may be received as evidence to overturn the presumption; and I take that to be the only principle on which even the naked possessor can work an ouster by his deed to another. In the case at bar, there was no room for presumption, any more than if the Smiths had taken a lease of *Wood*. Suppose the license to extend the dam had been in writing or under seal. It would have derived no greater force from either circumstance. It could have taken no firmer ground, nor have been more available, except in the facility and durability of the evidence by which

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it might be established. Yet no one would suppose in such a case, that possession of the owner could be disturbed by any adverse act of the person holding the license, any more than if he were a lessee. In both cases his possession would be the possession of the true owner ; his grantee steps into the shoes of his grantor ; he takes *cum onere*. A lease to his [*455] grantor is a lease to him, and so of a license ; so of every "thing by which the grantor has encumbered or qualified his estate. Verdicts, answers in chancery and other admissions of the grantor are all evidence against the grantee. They affect him in the same degree as they would his grantor, if they had been brought to act immediately on him. *Vid. Brander, ex dem. Fitch, v. Marshall*, 1 *Caines*, 394 ; *Jackson, ex dem. Griswold, v. Bard*, 4 *Johns. R.* 230. In such cases the law never stops to inquire whether the grantee have notice or not of the matter offered against him, unless there be some registry law requiring it. It is not pretended that the registry law extends to a license. In the case at bar, the license was clearly proved by persons who were themselves parties to it. There was scarcely more room for mistake than if it had been under their hands and seals. Clearly, it bound the plaintiff as well as the Smiths. If his title has been embarrassed by the act of his grantors or any other person, he must resort to a remedy on his covenants of title. He cannot expect that the law should give any effect whatever as against Granger, to acts between him and persons over whom Granger could have no control.

It is unnecessary to consider the other points in the cause made by the counsel for the plaintiff in error. They are of a minor character. The court below were, in the main, perfectly right ; but we think they erred in allowing an adverse possession to be raised in behalf of the plaintiff below, unless the jury could say they disbelieved both the witnesses who swore to license. Their want of credibility was not pretended. So far from that, all parties assumed that they spoke the truth.

The judgment of the court below is reversed ; *venire de novo* to issue there ; the costs to abide the event.

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***KETCHELL vs. BURNS.**

On a *guaranty* endorsed upon a note, whereby the *payment* and collection of the note is guaranteed to a third person or bearer, an action lies by any subsequent holder in *his own name*.

ERROR from the Cayuga common pleas. Ketchell sued Burns in a justice's court, and declared upon a *guaranty*, endorsed upon a promissory note, in these words : " For and in consideration of thirty-one dollars and fifty

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cents received of B. F. Spencer, I hereby guarantee the payment and collection of the within note to him or *bearer*. Auburn. Sept. 25, 1837." (Signed) Thomas Burns. The note upon which the guaranty was endorsed, was in these words : "By the first day of July next, I promise to pay Andrew H. Cooper or *bearer*, thirty-one dollars and fifty cents, with use, for value received. Hannibal, Sept. 12, 1837." (Signed) Chauncy C. Parsons. To this declaration the defendant *demurred*, because it was not alleged that judgment had been obtained against *Parsons*, the maker of the note, and that the action could not be sustained against the defendant. The justice overruled the demurrer, and the defendant pleaded to issue. The defendant then, on the trial of the cause, moved that the plaintiff be *nonsuited*, on the ground that the action should have been brought in the name of *Spencer*, and not in the name of the holder of the guaranty. The justice refused to nonsuit the plaintiff, and rendered judgment in his favor. The defendant *appealed* to the Cayuga common pleas, where the cause was tried by a jury, who found a *verdict for the plaintiff, subject to the opinion of the court* upon the question whether the guaranty was such an instrument as gave the plaintiff (a subsequent holder) a right of action thereon *in his own name*. The common pleas were of opinion that the plaintiff had no right to bring an action upon the guaranty in his own name, and accordingly rendered judgment for the defendant. The plaintiff sued out a writ of error.

*P. G. Clark, for plaintiff in error.

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J. Porter for the defendant in error.

By the Court, NELSON, Ch. J. Regarding the legal effect given to this form of guaranty by the decisions in this court, the plaintiff below was entitled to recover. It amounts to an absolute promise to pay the note if the maker fails at the day. 20 Johns. R. 365. 19 Wendell, 202. It is a new note for the payment of the money, upon full consideration, and as it is made payable to Spencer or *bearer*, it is negotiable. See also 17 Wendell, 214, and 6 Conn. R. 315.

It was supposed that this case should be governed by *Lamourieux v. Hewitt*, 5 Wendell, 307; but there the guaranty did not import an absolute undertaking to pay. The endorsement was, *I warrant the collection of the within note, for value received*; importing, simply a special agreement, that if the money could not be collected of the maker, the defendant would pay. Here the promise to pay is absolute and unconditional to Spencer or *bearer*—in terms a full negotiable note.

It is agreed if the endorsement had been in blank by Burns, while the note was in the hands of the original payee, the latter might have filled it

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up and recovered as on a promissory note payable to himself. 21 *Wendell*, 590. Here the defendant has done the same and more, for he has added words of negotiability.

Judgment reversed; *venire de novo* by Cayuga common pleas; costs to abide the event.

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**HOGAN & MILN vs. SHORB.*

Where goods belonging to his *principal*, were sold by a *factor* without knowledge of the ownership on the part of the purchaser, the latter, in an action on the contract by the principal, for the price of the goods, was held entitled to *set-off* a demand against the factor, although the sale was a *cash sale*, and the purchaser, when he obtained the goods, did not intend to abide by his contract, but purposed to set-off his demand against the factor.

It was further held, that the purchaser in this case was entitled to his set-off, although it consisted of a note of the factor not due until forty-five days after the sale, the principal not having commenced his suit until *after* the maturity of the note.

Whether if the factor or the principal, on discovering that the purchaser did not intend to pay cash, might have *disaffirmed* the contract and brought *trotter* for the goods, *quere*.

ERROR from the New-York C. P. *Shorb* sued *Hogan & Miln* in assumpsit for *goods sold and delivered*, and on the trial, claimed to recover the price of 50 bags of pimento or allspice. The plaintiff lived in Baltimore, and the defendants in New-York. The sale was made by *John B. C. Morris*, who also resided in New-York. *Morris* testified that, as the agent of the plaintiff, he sold the goods to the defendants about the 27th April, 1838, for \$304,20. But the name of the principal was not disclosed. The sale was for *cash*, or payable in from two to six days, which was deemed a *cash sale*. Morris had himself stopped payment 20 days before the sale, and that fact was notorious. At the time of the sale the defendants held Morris' note, given to them for \$618,92, but which would not become due until the 11th June following. Morris first sent a boy for the money immediately after the sale, but it was not paid. He then called himself on two occasions, but the defendants said they were *short of funds*, and wanted him to wait a little. About fifteen or twenty days after the sale, Morris called a *third* time, and the defendants then told him they thought he ought to let it be, and let it go against the note that was coming due. Morris answered that he had no right to do that—that the goods did not belong to him, and he must [*459] get the money. He told them that the owner lived in Baltimore; and he thinks he gave the owner's name, but of that he could not speak with any certainty. Morris further testified that he was a *commission merchant*, and such was his sign—and that if the defendants did not know it, every body else did. He had no doubt that the defendants

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knew he had stopped payment before the sale. Evidence was given, tending to show that the defendants made the purchase *with the intent to set-off the note, instead of paying cash, according to the contract.*

Stanton a produce broker, made the sale for Morris. He testified that *he did not know that the plaintiff was the owner*, and that *he sold the property to the defendant as belonging to Morris.* He further testified that he did not know that Morris was a commission merchant, and did not consider him as such, and Morris always dealt with him on his own account. The suit was not commenced until November, 1838, before which time the note had become due. The defendants gave the note in evidence, and claimed it as a set-off.

The judge charged the jury, first, that if the defendants treated with Morris as the principal or owner of the pimento, and knew him only as such owner at the time of the sale, although it was a sale for cash, the plaintiff was bound by the sale as one made by Morris in his own right, and the set-off could be allowed. Second, that a fraudulent purchaser acquires no title against the vendor; and if the defendants did not purchase the pimento of Morris with an honest intent to pay cash as agreed, but with the disguised and fraudulent object of obtaining possession of the property merely to apply it to the payment of the note, suppressing the object from Morris, then the set off could not be allowed, if the plaintiff was the true owner of the article sold, although he was not known to the defendants as such owner at the time when they purchased. To the second branch of the charge, the defendants excepted. The jury found a verdict for the plaintiff for the price of the goods; and judgment having been rendered in his favor, the defendants now bring error.

S. Sherwood, for plaintiffs in error.

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H. F. Clark, for defendants in error.

BRONSON, J. If the defendants were contending with *Morris*, I do not see how the set-off could be resisted. By an absolute delivery of the goods, he waived the condition, on which he might otherwise have insisted, of having present payment. *Lupin v. Marie*, 6 *Wendell*, 77. Though if the delivery had been procured by fraud on the part of the vendees, the title would not have passed. *Earl of Bristol v. Wilsmore*, 1 *Barn. & Cress.* 514. *Wilmarth v. Mountford*, 4 *Wash. C. C. R.* 79. It is not necessary that the sale should, in express terms, be for cash. If the vendor do not agree to sell on credit, he is not obliged to part with his goods until the price is paid. But this condition, whether express or implied, will be waived by an absolute delivery, if it was not brought about by an artifice on the part of the vendee.

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It is said that the title did not pass as against Morris—considering him as the owner of the goods—on account of the fraudulent purpose of the vendees to set-off their note, instead of paying cash according to the agreement. If this can properly be characterized as a fraudulent transaction—*Chapman v. Lathrop*, 6 *Cowen*, 110; *Eland v. Karr*, 1 *East*, 375; *Downer v. Eggleston*, 15 *Wendell*, 51—it is too late to set up such an allegation after affirming the sale by repeated applications for payment, and bringing an action to recover the price of the goods. In *Chapman v. Lathrop* the vendors attempted to disaffirm the sale, and after a demand brought *trover* to recover the goods. But they had waited a fortnight after the delivery before the demand was made, and the action failed. It may, perhaps, be an open question whether the vendor, immediately after the delivery and when he first discovers that the vendee does not intend to abide by his contract to pay cash, may not disaffirm the sale and bring *trover* for the goods, if they still remain in the hands of the vendee.

[*461] But Morris has never attempted to recall the goods; and "whatever may be the fraud, if the goods are actually delivered in pursuance of a contract of sale, the bargain cannot be so absolutely void but the vendor may elect to affirm it. An action for the price of the goods is a plain affirmation of the sale; and any considerable delay in requiring a return of the goods after discovering the fraud, would, I think, work the same consequence.

If Morris had brought the action, the set-off could not have been resisted, how stands the case with the plaintiff? When the sale is made by a factor, an action for the price may always be brought by the principal, as well as by the agent; and the rule is the same, although the agent act under a *de credere* commission. But the principal, by suing in his own name, cannot defeat the existing equities between the vendee and the factor, unless they are chargeable with collusion, or there has been some act on the part of the vendee which operates as a fraud upon the owner of the property. One of the earliest reported cases on this question is *Raybone v. Williams*, 7 *T. R.* 356, note (a.) where the rule is thus laid down by Lord Mansfield: "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal: and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set-off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." This case was followed in *George v. Clagett*, 7 *T. R.* 355; which is considered a leading case, 2 *Smith. Lead. Cas.* 77, and has, I believe, never been questioned. The same principle applies where one of several partners is permitted to act, and hold himself out to the world as though he

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were the only person interested in the business. He cannot, by uniting the name of the sleeping partners in a suit against a third person, defeat a set-off which would have been available had he sued alone. *Stracy and others v. Deey*, 7 T. R. 361, note (c.) See also *Coats v. Lewes*, 444. *Blackburn v. Scholes*, 2 Campb. 341. **Carr v. Hinchliff*, 4 Barn. & Cress. 547. In *Baring v. Corrie*, 2 Barn. & Ald. 137, the sale was made by a *broker*, and in an action by the principal, the vendees were not allowed their debt against the agent. But the case turned principally on the distinction between a *factor*, who is usually entrusted with the goods and sells in his own name, and a *broker*, who is not usually entrusted with the goods, and ought only to sell in the name of his principal : and stress was laid on the fact, that the plaintiffs had not enabled the broker to impose on third persons, by entrusting him either with the possession of the goods, or the muniments of their title.

When the name of the principal is disclosed at the time of the sale, the vendee has no right to set up any equities between himself and the factor to defeat the action of the owner ; and the same consequence will, I think, follow, if the vendee knew, or had good reason to believe, he was dealing with the agent of another, although the name of the principal was not disclosed. *Maanss v. Henderson*. 1 East, 335. 2 Smith. Lead. Cas. 79, note to *George v. Clagett*. But a mere general knowledge that the person selling the goods is a factor, if he also carry on business on his own account, will not be sufficient to charge the vendee with notice. *Moore v. Clementson*, 2 Campb. 22. He must know or have good reason to believe that the vendor is acting as the agent of some other person in that particular transaction.

In this case, the jury would have been authorized to find, 1. That the plaintiff was the owner of the goods ; 2. That Morris sold as though he were the owner, without disclosing the name of his principal ; 3. That Morris was a commission merchant, also carrying on business on his own account ; 4. That he had a few days before stopped payment, and that this fact, as well as the general nature of his business, was known to the defendants at the time of the sale ; and 5. That although the sale was for cash, the defendants intended to pay for the goods by the note of Morris. Would any or all of these facts authorize the jury to find that the defendants knew or had good reason to believe that Morris, in this particular transaction, was acting as the *agent for some other person ? I [*463] think not. The fact that Morris was a commission merchant, had little or no tendency to prove notice, because he was also a trader on his own account. The fact that he had stopped payment proves nothing, because, after the happening of that event, he would be as likely to sell his own goods as he would the goods which a third person had previously entrusted to him. And the fact that the defendants intended to set off the note, rather tends

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to show that they believed Morris was the principal, for otherwise they could hardly hope to accomplish their object. The judge would, I think, have been well warranted in telling the jury that the defendants were entitled to a verdict. It will not do in such cases to *guess* that the vendee had notice. It must appear from the nature of the transaction, or from something which transpired before the contract was completed, that the vendee had good reason to believe he was dealing with an agent. In a commercial community, no rule short of this will afford sufficient protection to purchasers.

The law was correctly stated in the first branch of the charge, that if the defendants treated with Morris as the principal, and knew him only as owner at the time of the sale, the plaintiff was bound, and the set off could be allowed. But the defendants were deprived of the benefit of this instruction, by that which immediately followed. In the second branch of the charge, the judge told the jury that a fraudulent purchaser acquires no title against the vendor; and he, in effect, instructed them, that the defendants were such fraudulent purchasers, and that the set off could not be allowed, if the jury believed that the defendants purchased the goods with a fraudulent intent to pay Morris by his own note, instead of paying cash according to the agreement. But the plaintiff does not seek to disaffirm the sale and reclaim the goods on the ground of fraud. By bringing this action for the price, he affirms the sale. His language to the defendants is, "although you intended to defraud Morris by not performing your contract to pay cash,

I waive that objection; I elect to consider the sale valid, and you [*464] must pay me the price." And then the question arises, "whether the defendants are not entitled to their set off; and that question depends on the inquiry whether they dealt with Morris as principal, without notice that he was acting for another.

I was inclined, on the argument, to think the judgment might be supported on the ground that the note had not become due at the time the defendants were informed, two or three weeks after the sale, that Morris was not the owner of the goods. But the case was not put upon that ground by the court below. It was treated as a question of fraud. And besides, further reflection has led me to doubt the correctness of my first impression. Either Morris, as the vendor, or the plaintiff as owner, might have defeated the set off by suing for the price before the note fell due. But that was not done; and having waited until the note became the proper subject of a set off, the defendants have got rid of that difficulty. The only question now is, whether they can set off a debt which they held at the time of the sale, and which was due at the time the suit was commenced. The principal may no doubt come in at any time after the sale, and arrest all further dealing between his agent and the vendee; and if after notice from the principal, the vendee pays the agent, or acquires a demand against him, he cannot set that up as

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a defence in an action by the owner of the goods. But notice after the sale will not defeat any equity already existing between the vendee and the agent. The defendants had such an equity. They bought the goods for the very purpose of obtaining payment of their debt against Morris; and the right to set off the note, though inchoate at the time of sale, became perfect before the suit was commenced. Although the plaintiff might have succeeded by suing at an earlier day, he has suffered that advantage to slip, and the case now stands as it would have done had the note been due at the time of the sale.

The Chief Justice concurs in the result of this opinion on the sole ground that the case was improperly put to the jury as a question of fraud.

Judgment reversed.

*DUDLEY *vs.* BOLLES.

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A servant in charge of the property of his master, which has been injured or destroyed by the negligence of another, is a competent witness in an action *by the master* for the recovery of damages; but is not a competent witness in an action *against the master* for an injury to the property of another through his (the servant's) alleged negligence.

Evidence of previous statements made by a witness in confirmation of his testimony is in general inadmissible.

A traveller on horseback meeting another horseman or a vehicle on a public highway is not required to turn out in any particular direction to avoid collision; all that is required is prudent care under existing circumstances.

ERROR from the Chenango common pleas. Bolles sued Dudley in a justice's court, and declared against him in a special action on the case, "for driving immoderately and unlawfully, a mule in a cutter, on a public highway in the town of Smithville, so as to run against a certain mare in the possession of the servant of the plaintiff, in such a manner as to cause her death, on the 7th day of March, 1838." The defendant pleaded the general issue. The cause was tried by a jury, who found a verdict for the plaintiff, with \$40 damages, on which judgment was rendered. The defendant appealed to the Chenango common pleas. On the trial in that court a motion was made to nonsuit the plaintiff because it was not stated in the declaration that the act complained of was done *negligently*, and that title in the mare either absolute or limited was not alleged to be in the plaintiff. The court refused to grant the nonsuit. The plaintiff called *Augustus Bartle* as a witness. He was the servant of the plaintiff, and rode the mare at the time of the injury. The defendant objected to his competency as a witness, but the objection was overruled, and he was sworn.

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He proved that the defendant's mule, being on a trot in the cutter, struck and killed the plaintiff's mare, while the witness who was riding her, was in the act of turning out on the side of the road upon his left, [*466] with a view to avoid the cutter. This witness was contradicted as to some particulars, and it was proved that he had made statements materially variant from his testimony in court. In reply, the plaintiff offered proof that, about the time of the accident, he had made statements to other witnesses conforming to what he had sworn on the trial. This was objected to ; but the evidence was received. The defendant requested the court to charge that the plaintiff's servant was bound to turn to the right with his mare, on meeting the cutter. This they declined to do : and on the contrary, instructed the jury that the servant was not in fault for turning to the left. The defendant excepted to the several decisions of the court and to the charge ; and the verdict and judgment being against him, he brought error.

H. R. Mygatt, for the plaintiff in error.

W. M. Patterson, for defendant in error.

By the Court, COWEN, J. The defendant cannot take advantage of a defect in the declaration by a motion to nonsuit the plaintiff. The objection should be taken by demurrer, or in arrest of judgment, or by writ of error. The averment of *inmoderate* driving may, perhaps, be considered as equivalent to one of *negligent* driving ; and in this respect the declaration here sustainable on error after verdict ; though the same thing can perhaps hardly be said of the total omission to shew *property* in the mare. The declaration was simply for an injury to a mare in possession of the plaintiff's servant. This might as well be the mare of a stranger as of the plaintiff. The objection certainly would not lie upon *certiorari* after a full trial on the merits, it appearing by the return of the justice that property was made out in fact. The only mode of raising the objection in such case would be by demurrer ; but on appeal, the evidence is not returned, nor is it brought here by a bill of exceptions in such a form as to supply any defect in the declaration which would not be cured by verdict at the common law. [*467] The total omission to show title to the *property for which the plaintiff below recovered is clearly such a defect. As the cause must go down for a new trial, for error appearing in the bill of exceptions, the plaintiff below should in prudence obtain leave to amend.

Was the plaintiff's servant a competent witness ? His negligence was clearly in issue ; and if the injury imputed to the defendant arose from such negligence, the witness was liable to the plaintiff. A recovery against the

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defendant would not, however, have the effect in itself to exonerate him. His negligence in truth causing the death of the mare, the master might sue and recover against him notwithstanding an uncollected verdict and judgment against the defendant. The servant is equally a wrongdoer and equally liable although the master recover against another as the real wrongdoer, on the strength of the servant's testimony. In ordinary cases it is perfectly well settled that where you sue one of two joint wrongdoers, you may resort to the other as a witness. This is allowed in England even where a recovery against one operates *per se* as a bar to an action against the other; *a fortiori* in this state, where it is so only *sub modo*, and not till the plaintiff has finally elected to collect of the first by at least taking out execution. The plaintiff's *agent* is constantly received for him, even where his negligence would defeat the action and turn the plaintiff's remedy upon the witness. But the cases are conflicting as to the *servant*. When called for the defendant, all cases agree that he is not admissible. The verdict against the master would, in such case, always be evidence against him to show the amount of damages for which he may become liable over; 1 *Phil. Ev.* 56, 131, *Cowen & Hill's ed.*, note 95, p. 106, 7; note 244, p. 256; *id.* p. 1530, 1; and with us, I apprehend, it would be conclusive, on proving that he had notice, and was called on to defend the original action. He stands in the relation of an indemnitor or a warrantor against an injury. The argument for exclusion thus becomes obvious and conclusive. Clearly, however, the same principle does not apply when he is called for the plaintiff. The verdict is not evidence against him, though his master should fail in the action. *Phil. Ev.* 99, 8th ed. The "failure" [*468] may arise from causes over which the servant never had any control, and for which he is not accountable: such as the want of proof, or negligence in the conduct of the cause. On the other hand, it is true his own oath may in the result work a recovery against another, and a consequent satisfaction exonerating him. So of the agent and joint wrongdoer. They are brought up as witnesses to work the same consequence in their own favor. So the endorser of a promissory note, called by his endorsee against the maker. Yet he is uniformly received in England; and though not, perhaps, yet receivable with us, he certainly is by several courts in this country. The effect of the servant's testimony in his favor is contingent, nothing more; and it is a general rule that mere contingent interest shall not exclude a witness. In what cases it shall be deemed contingent the authorities are not uniform; and perhaps least of all on the point now presented.

When Mr. Phillipps wrote his 7th edition, he felt authorized to do no more than notice the exclusion of the servant, when his master was defending. Westminster Hall seems not to have been considered as having spoken decisively against his admission for the master when plaintiff, though the point

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had been directly decided in *Moorish v. Foote*, 2 *Moor.* 508, 8 *Taunt.* 453, and *Miller v. Falconer*, 1 *Camp.* 251; and there were several other cases which went that length in principle. Such were all those which held that in an action against one for a debt due from him and another, the latter could not be received as a witness for the plaintiff, because by promoting a recovery he might place himself in a condition of security. We had occasion to notice several of these cases in considering *Collins v. Ellis*, 21 *Wendell*, 399, 400. Several American cases are there cited to the same effect, and one or two in this court. *Collins v. Ellis* is itself one of this character. The witness was called to raise a fund in the hands of the defendant by which the witness' own debt might be discharged. Soon after Phillipps' 7th edition was published, a series of *nisi prius decisions* took place by

which the doctrine was entirely settled in England, so far as it [*469] could be by that class of decisions, that "where the master sues

for a negligent injury done to his property in the hands of his servant, the latter is equally inadmissible for the master as if he were defendant. They are collected in the notes to that edition by *Cowen & Hill* pp. 107, 1526 and 1530. I shall not go over them. The last is *Sherman v. Barnes*, 1 *Mood. & Rob.* 69, which was the very case now before us. The plaintiff's horse being driven by his servant was run against and injured. On his calling the servant and partly examining him, Tindal, C. J. struck out his testimony, though he expressed himself dissatisfied with the principle on which such witnesses were rejected. In the still later edition of Phillipps, by him and Amos, (8th ed.) 100, it is said to be established by this and other cases, that "where a witness is so connected with the dispute in a particular action, that a verdict for the plaintiff would entirely relieve the witness from a liability over, to a subsequent action, which the plaintiff might bring against him if the defendant were to succeed, such witness will be incompetent to give evidence on behalf of the plaintiff, by reason of a direct interest in the event of the cause." *Moorish v. Foote* was a decision in *banc*; and in *Sherman v. Barnes*, the chief justice of the C. P. considered it as controlling, though he differed from it in principle. In *Wake v. Lock*, 5 *Carr. & Payne*, 454, Lord Denman, C. J. inadvertently received as a witness for the plaintiff, his servant, in whose hands the plaintiff's fly was damaged by collision with the defendant's waggon; but declared he should not have done so, had *Moorish v. Foote* been mentioned. Truly, therefore, the question seems to be settled in England against the servant's admissibility. The last English case I have seen, *Robinson v. Fereday*, 8 *Carr. & Payne*, 752, (A. D. 1839,) still adheres to the rule. Following these cases, we must hold that Bartle the witness here, was directly interested.

On the other hand, the counsel for the defendant thinks that *The United*

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States Bank v. Stearns, 15 *Wendell*, 314, 316, is conclusive in favor of his admissibility. The plaintiffs sued for an overpayment by their teller made, as he swore, by mistake; and he was received as a competent witness for the plaintiff. The question turned on the words [*470] of his surety bond, and the necessity of admitting an agent although interested. That he was testifying in favor of a recovery which might place him in a state of security against an action by the bank, for their money, which he had carelessly paid out, does not seem to have been noticed. He was thought to come within the general rule that an agent or servant is admissible as a witness for his principal. I recollect no case in this court directly denying the principle of *Moorish v. Foote*, though I take it that principle was involved in *The United States Bank v. Stearns*. It has often been recognized in respect to matters of contract, as may be seen in *Collins v. Ellis*. In *Johnson v. Harth*, 2 *Bailey*, 183, it was denied in respect to a servant, by the court of appeals of South Carolina. The action was by the endorsee against the endorser; and the notary who acted in behalf of the plaintiff had neglected to give the regular notice; yet he was received as a witness for the plaintiff to show a state of facts rendering the defendant liable, notwithstanding the omission. It was agreed that the witness was liable directly or indirectly to the plaintiff for his negligence. That was in issue, and his oath might secure him against an action. But the court, by Harper, J., said the interest was contingent, whereas to disqualify the witness it must be certain and immediate. Per Kennedy, J. in *McDowell v. Simpson*, 3 *Watts*, 135, *S. P.* This doctrine derives countenance from all that class of English and American cases before noticed, and which are very numerous, holding that one of two joint wrong doers, off the record, is admissible for the plaintiff in an action for the wrong. 21 *Wendell*, 402. 1 *Phil. Ev.* 41, 47, *Cowen & Hill's ed. and note 75*, p. 70. *Id.* p. 1511, 12. It has been impossible for me to see that the reason in the case at bar is stronger for the exclusion of the witness, than it is in respect to one of two joint wrong doers. In England it would certainly not be so strong. Yet the servant, the supposed wrongdoer, is excluded by one class of cases, while the co-trespasser, the acknowledged wrongdoer is admitted in the other. The distinction against admitting the servant [*471] is evidently disapproved of by the modern English judiciary; but they all deem themselves committed by *Moorish v. Foote*, and other cases. We are, I think, not so committed, though I thought we were in *Collins v. Ellis*, against receiving one of two alleged debtors to charge the other. Had the question been *res integra*, the propriety of our decision there might be well doubted as being against the salutary inclination of courts to enlarge the sphere of competency. We are not bound by the modern decisions of Westminster Hall, though I confess we always ought to

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disregard them with great hesitancy. I admit the question is by no means free from difficulty; but my own mind has been determined mainly from a fear that if we adopt the English cases, we may be called on by an argument beyond the power of resistance, for aught I see, to bring within their principle, brokers and other agents. The teller in the *United States Bank v. Stearns*, was but a servant. Agents, attorneys and trustees are very commonly in the same case with servants. It has already been asserted by a learned judge in a neighboring state, on the authority of *Starkie's Evidence*, that where the agent is called to prove the performance of some duty or contract for the plaintiff, he is incompetent. *Dennison v. Hibbard*, 4 *Verm. R.* 499. The principle of necessity has been asserted in such cases. But by what considerations is that necessity to be limited? Is not the principle of contingent liability much more certain and intelligible? It is better settled; for some modern books on evidence deny that necessity should be admitted as a ground for receiving a witness. Where he is directly liable over as a consequence of the recovery, it is necessary that he should be released. If not so, the books are full of the principle that he is incompetent. There is no general rule better established than that servants are competent witnesses for their masters. Yet if the principle of *Moorish v. Foote* were to be liberally applied, the professed exception would overcome the principle. Servants, agents and trustees, when called as witnesses to sustain the transaction in which they have been engaged, are generally subject to [*472] the imputation of having "an interest to support it; for they are liable if it fail through their negligence. The true answer is that the interest is contingent. The record can in no way affect them; though they may be liable should their principal fail in the action. What possible difference is there between servants and agents? And if the former are repudiated as incompetent, why not the latter? All persons acting in the employment of another, are servants within the rule: attorneys, solicitors, sheriffs, &c.

I am unwilling, on the mere force of authority even in Westminster Hall, to adopt a principle verging towards the exclusion of whole classes heretofore deemed competent. On the whole, we think Bartle was properly received as a witness.

The reception of Bartle's statements in confirmation of his testimony, was erroneous. We have recently in *Robb v. Hackley*, 23 *Wendell*, 50, *et seq.* reconsidered the *dictum* to the contrary in *The People v. Vane*, 12 *Wendell*, 78, and agreed that consistent statements cannot in general be received in reply to the contradictions of a witness; *a fortiori* are they inadmissible in answer to direct and positive contradiction by other witnesses.

There is no law of the road requiring a man on horseback, when meeting a horse or vehicle, to turn out on the *right* or *left* side. The rider must

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govern himself in this respect according to his notions of prudence at the time, under the circumstances.

Judgment reversed; *venire de novo* from the court below.

"THE BANK OF POUGHKEEPSIE vs. LIBBOTSON. [*473]

An action at law lies against an individual stockholder of a corporation formed under the act relative to incorporations for manufacturing purposes, for debts owing by the company at the time of its dissolution; and he may be charged to the extent of his shares of stock.

In such suit, it is not necessary to allege specially in the declaration the grounds relied on as evidence of dissolution; a general averment of dissolution is enough.

A joint action against all the stockholders it seems cannot be maintained.

DEMURRER to declaration. The plaintiffs in their declaration, stated that on the 9th January, 1839, a certain corporation for manufacturing purposes, known as "The New York Stock Frame and Cotton Manufacturing Company," had been incorporated pursuant to the act entitled "An act relative to incorporations for manufacturing purposes," passed 22d March, 1811, and the amendments thereto, and as such was doing business at the town of Poughkeepsie, in the county of Dutchess, and afterwards and before the commencement of this suit, to wit, on the 20th day of June, in the year aforesaid, *when the said corporation was dissolved in fact*; that on the 9th day of January aforesaid, the company had become indebted to the plaintiffs in the sum of \$1000; that the plaintiffs duly prosecuted their suit in this court against the company, for the recovery thereof, and on the 9th January, 1839, by the judgment of the court, recovered against the company \$706.89 damages and costs; that on the 18th January, 1839, a *fieri facias* was duly issued, which was returned *nulla bona*, &c.; that the corporation have no goods or chattels, lands or tenements which can be levied on to satisfy the judgment; that at the time judgment was obtained, to wit, on, &c., and at the time of the issuing and return of the execution, the defendant in this cause was a stockholder and owner of shares of stock in the said company to a large amount, to wit, to the amount of \$2000, and as such stockholder, composed one of the company. By means of which premises, and by force of the statute entitled "An act relative to incorporations for manufacturing purposes," passed 22d March, 1811, and the amendments thereto, and the certificate of incorporation duly filed, the defendant became and was individually liable to pay to the plaintiffs the full amount of the said judgment; and being so liable, &c. promised to pay, &c.

To this declaration the defendant demurred, and assigned as special causes of demurral the following: 1. that it is not averred that the company have

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not equitable interests, debts due to them, money or other property which could be appropriated to the payment of its debts, and to an amount sufficient without resorting to the stockholders ; 2. that it is not averred that there has been any settlement of the concerns of the corporation, or of the liabilities of the individual shareholders, so that it might appear whether the shares had been paid for by all the shareholders ; whether the company was in fact insolvent ; and in what amount the shareholders were respectively liable ; 3. that it is not averred that the liabilities of the defendant and other shareholders have not already been discharged in payment of other debts of the corporation ; 4. that it does appear by the declaration that there are other shareholders besides the defendant who are liable with him, if this action can be sustained, and therefore should have been joined as co-defendants ; and 5. that an action at law cannot be sustained against an individual stockholder, or even against all the stockholders ; that the remedy is in equity, &c. The plaintiffs joined in demurrer. The cause was submitted on written arguments.

A. H. Dana, for the defendant, insisted that the section of the statute under which this action was brought contemplated a dissolution of the corporation in the ordinary course, by limitation of time ; after which, there being no corporation, it was necessary that there should be some other resort for unpaid debts.

He argued, that at one time it was supposed that a dissolution of a corporation could not take place within the time limited by the charter, except by surrender of its corporate franchises, or a forfeiture declared by judgment of law on scire facias. After an elaborate discussion, however, it [*475] was finally settled that a corporation might be dissolved by its ceasing to own property, and abandoning its business without ability to resume it. *Per Spencer, Ch. J. in Slee v. Bloom*, 19 Johns. R. 477. *Woodworth, J. in Briggs v. Penniman*, 8 Cowen, 391.

It is recited in this declaration that the corporation was *dissolved in fact*. It is not a technical averment, in reference to the statute. Any other mode of dissolution than by expiration of time must be set forth with certainty ; and to make out such constructive dissolution, there must be *insolvency* of the corporation. As to creditors, a corporation cannot be dissolved within the time limited by the charter while it has funds. This is conceded in all the reported cases, and the plaintiffs in fact admit it, and aver that there was no property that could be taken in execution. This might be, and yet sufficient assets might exist to pay all the debts. Unpaid subscriptions are corporate property, and can be reached by the creditors in a court of equity. *Per Spencer, Senator, in Briggs v. Penniman*, 8 Cowen, 395, and see also

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Slee v. Bloom, 19 Johns. R. 484. The decree was that the subscription should be paid in full.

Secondly. The shareholders are to be *individually* responsible as distinguished from corporate liability, but not *severally*. The corporation is in fact a partnership, with some of the incidents of a corporation ; and after dissolution it is strictly a partnership liability, which must be enforced against *all* the shareholders. If it is supposed that each is liable severally, what is to prevent suits by a creditor against each of the shareholders at the same time ? Neither shareholder can plead the pendency of a suit against the others. Again : *all* the creditors may, upon the same principle, sue each for himself a single shareholder at the same time. Can it be that such a proceeding could have been intended by the statute ? These difficulties in the application of the rules of pleading tend to show the remedy at law inappropriate. The proper proceeding, and the *only one*, is in chancery. *In general*, the jurisdiction of chancery and courts of law is not concurrent. All the cases in the books under this section of the statute were in chancery, "and jurisdiction was entertained because there was [*476] no remedy at law. *Per Chancellor Sandford*, 1 Hopk. 305. The fund liable for debts (that is the sum of all the individual liabilities) is to be distributed *rateably*. *Per Woodworth, J. in Briggs v. Penniman*. 8 Cowen, 392. It is a fund belonging to all the creditors. The right cannot be varied by a lien in favor of *one* creditor by judgment and execution against the corporation. The lien arising under a creditor's bill is given by statute, 2 R. S. 174, § 39 ; but it takes effect only by the filing of a bill. *Corning v. White*, 2 Paige, 569. It is to be regarded as a *trust*, of which courts of law do not take jurisdiction. *Brown v. Le Roy*, 4 Johns. Ch. R. 651. *Egberts v. Wood*, 3 Paige, 518.

The question to be determined is, whether the complicated interests necessarily involved in the case of a dissolved corporation can be disposed of by suits at law ; and it ought to be considered not only in respect to the injustice that may thus be done, but whether it is compatible with the course of *legal proceedings* to try such rights. A shareholder may by plea in abatement cause all the parties to be brought in. Then there must be an investigation as to the assets of the corporation. The primary liability of the shareholders is for their subscriptions. These must first be exhausted ; then the accounts of each of the shareholders with the corporation must be investigated. They are entitled to set off whatever they have advanced in payment of the debts of the corporation. The liability of each may be different, and there would have to be several judgments. These difficulties furnish sufficient ground for the court to declare the remedy inappropriate, as they would do in a suit by one partner against another, or of a creditor against a trustee for an unliquidated claim upon a trust fund ; and that it is

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not necessary to obtain the intervention of the court of chancery by injunction.

S. A. Foot, for plaintiffs. The declaration contains all the averments requisite to show a full right to recover as the counsel for the defendants appears to concede, except that there ought to have been fuller averments respecting [*477] the dissolution of the corporation, viz. that its insolvency, abandonment of its business, and destitution of funds to pay debts, should have been alleged in addition to the facts stated.

There are two kinds of dissolutions of corporations; one in fact, and the other in form. The latter is only effected by the judgment of a court of competent jurisdiction; the former by the acts or omissions of the corporation; and whether a corporation has been dissolved in fact, depends on a variety of circumstances, and is always a subject of proof. This fully appears by the two cases on this subject which have been decided in our courts. *Slee v. Bloom, and Penniman v. Briggs*, 1 *Hopk. R.* 300. 8 *Cowen*, 387, *S. C. in error.* Those cases have also settled this further proposition, that the right of a creditor to resort to the stockholders, attaches upon a *dissolution in fact* of the corporation. The declaration in this case, instead of setting forth the *evidence* of a dissolution in fact of the corporation, contains a full and unqualified averment of such dissolution. This is the proper and well established mode of pleading. When the parties come before a court and jury, then it will be material to inquire what facts constitute a dissolution, and whether they exist in this case.

The next subject of inquiry is, whether a creditor of a corporation can maintain an *action at law* on this statute. The statute does not confine the remedy to a court of chancery. As a general rule, a statutory liability is more appropriately and more commonly enforced *at law*, than in chancery. If stockholders have no remedy under this statute except in chancery, then in most cases the statute will be useless. Suppose a creditor has a debt for \$150, must he go through the tedious and expensive process of a chancery suit, in which all the stockholders as well as all the creditors must necessarily be made parties, and the rights of all, as between each other, adjusted before he can have his \$150? Or, may he select a stockholder who owns stock to an amount beyond that of his debt, and call upon him for payment, and if such stockholder has a claim on others for contribution, leave him [*478] to enforce such claim? If the "statute means anything, each stockholder is liable for the debts of the corporation to the extent of his stock—and when he has paid to that extent, he is no longer liable. It is unnecessary to inquire at this time whether a stockholder can plead in abatement the non-joinder of other stockholders, though it appears to me clearly not, as they own different amounts of stock, and are consequently

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subject to different rules of liability. One may be liable for \$100, another for \$1000, and a third for \$5000.

There is no doubt, and the two cases already referred to, show that a creditor may seek redress, *in equity*, under appropriate circumstances ; and where he has a large claim, and must resort to *several stockholders* to obtain satisfaction, the court of chancery would probably be the more appropriate tribunal ; and being appealed to, it would probably in accordance with its general course bring in all parties interested and settle the whole matter in one suit. But suppose there is but one creditor, and but one solvent stockholder, or but one who owns over one hundred dollars of stock ; or but one creditor, and his debt less than \$100, and not one stockholder who owns over \$100 of stock—would the court of chancery then be the appropriate tribunal ? See 2 R. S. 173, § 37.

Will this court refuse its aid in a clear case of liability, where, so far as appears, there is but one creditor, and but one stockholder who is liable ? If the defendant has an equitable and not a legal defence, the court of chancery is open to him, and on filing his bill he will obtain the desired relief. But if he has no equitable defence, nor any claim to contribution from his co-stockholders, should not this court enforce the plaintiffs' right ? If the plaintiffs are the only creditors, and the defendant the only stockholder liable, would not a court of equity refuse to interfere, on the ground that there was an adequate remedy at law ? Every thing of late years in this state has received such a tendency to the court of chancery, that my learned opponent seems to think that *this court* must volunteer in this case to *presume* a state of facts, to deprive it of one of its appropriate functions, viz. the enforcement of statutory liabilities ; *and having made the presumption, [*479] must act upon it, and surrender an important branch of its jurisdiction.

By the Court, NELSON, Ch. J. The principal question sought to be presented in this case is, whether *an action at law* will lie to charge the stockholder personally under the act.

The seventh section provides, that for all debts due and owing by the company at the time of its dissolution, the persons then composing it shall be individually responsible to the extent of their respective shares of stock. 3 R. S. 222. It has been repeatedly held that the dissolution here spoken of, in order to subject the shareholder, may be shown short of judicial proceedings for that purpose. Having ceased to act, and being without funds and indebted, it is to be deemed dissolved so far as to give the remedy to the creditor. 19 Johns. R. 456. Hopk. 300. 8 Cowen, 387. This dissolution *sub modo* being proved, the liability of the stockholder, as declared by the act, becomes absolute ; and I see no valid objection to the enforcement of it in a court of law. There can be no greater difficulty in estab-

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lishing or resisting the demand there, than in a court of equity, as the ground and extent of the liability are distinctly given. It is true, the stockholder may be subjected to several suits; but he can be charged only to the extent of his stock. Beyond this, his defence is as perfect at law as in equity. On payment of debts, or a personal charge in respect to them to this amount, there is an end of further liability. It was made a question in the several cases above referred to, whether the suit in equity could be maintained, on the ground of a remedy at law; the answer given confirms the view we have taken—it is, that the creditor is entitled to contribution from all the stockholders, if requisite to the satisfaction of his debt, and that numerous suits might become necessary. To avoid this, he may resort to that court. The creditors, if more than one, may also, it seems, if they apprehend a deficiency in the fund, enforce in equity a *pro rata* distribution.

8 *Cowen*, 392. But this must be at their election. Any difficulty that may exist on the part of the stockholder, in protecting himself beyond the statute liability, has never been suggested as a ground for proceedings in equity. Indeed, it is clear, that as to him the defence is as perfect, if not as simple, in the one court as in the other. This question has been before the chancellor in an analogous case, in which he held, inasmuch as the creditors had a concurrent remedy at law, the statute of limitations, applicable to the proceedings there, equally governed in equity. 3 *Paige*, 409. See also *Angel & Ames on Corp.* 369.

It is supposed, the pleader should have set out in the declaration the grounds upon which a dissolution is predicated. We think not. The fact, upon which the statute liability depends in this respect, to wit, the dissolution, is averred—and the decisions point out the nature of the proof required to establish it.

There can be no doubt, that the liability of the stockholders is *several* and not *joint*. The measure of it may be wholly different in each case, depending upon the shares held. A joint suit would be impracticable, as there could be no joint judgment. Besides the act did not intend they should be sureties for each other. Each is severally responsible to the amount of his own stock.

The plaintiffs, I think, are entitled to judgment on the demurrer.

EDWARDS & MCKIBBEN vs. CLEMONS & CROZIER.

A notice of special matter accompanying a plea, intended to be insisted on at the trial, is good if it fairly apprise the plaintiff of the material facts upon which the defendant means to insist.

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A *parol lease* for four years, though void in itself, may be shown in evidence to support a distress for rent where the tenant enters and occupies the demised premises.

Where a defendant in replevin avows the taking under a demise at an annual rent *payable quarterly*, and the proof is that the rent is *payable annually*, (saying nothing as to quarterly payments.) there is a variance; but as it does not operate prejudicially to the opposite party, it may be disregarded at the circuit and the party be permitted to apply to amend his pleadings.

"THIS was an action of *replevin*, tried at the Erie circuit in [*481] January, 1839, before the Hon. NATHAN DAYTON, one of the circuit judges.

The plaintiffs declared in the *detinet* for a quantity of merchandise. The defendants pleaded the general issue, and gave notice of special matter to be proved on the trial, that they, *as the bailiffs of Alanson Palmer*, would acknowledge the taking of the goods in the building, &c. and justly, &c. because the plaintiffs for one year preceding the 1st May, 1837, and from thence until and at the time when, &c. enjoyed the building in which, &c. as tenants to Palmer, by virtue of a demise theretofore made under the yearly rent of \$600, *payable quarterly*, on the first days of August and November, 1836, and the first days of February and May, 1837, and because \$120,75, parcel of the said sum of \$600, for the space of one year ending on 1st May, 1837, was due and in arrear from the plaintiffs to *Alfred Clemons and one Horatio Warren, the assignees of the said Alanson Palmer*, they the defendants, *as bailiffs of Palmer*, acknowledge the taking of the goods, &c. *as for and in the name of a distress* for the said sum of \$120,75, so due and in arrear to the said *Alfred Clemons and Horatio Warren*, assignees of Alanson Palmer as aforesaid. The notice further stated that the defendants would farther give in evidence in bar of the action, that on the 28th June, 1837, the plaintiffs were justly indebted to *Alanson Palmer* in the sum of \$120,75, for the rent of a certain building situate, &c. leased to them by Palmer on 1st May, 1836, for one year, at the yearly rent of \$600, payable quarterly; which sum of \$120,75, being the balance of the rent of the year aforesaid, became due on the 1st day of May, 1837, and the defendants took and distrained the goods, &c. by virtue of a distress warrant *duly issued by Palmer* against the goods, &c. of the plaintiffs, for the rent aforesaid, as they lawfully might. On these pleadings the cause was tried.

The plaintiffs produced in evidence an *affidavit* of the rent due, made by *Alfred Clemons* on 27th June, 1837, in which he stated that on or about 1st May, 1836, *Alanson Palmer* demised and let to the plaintiffs, *for the term of four years*, a certain "building (describing [*482] it) at a yearly rent of \$600, payable quarterly, and that there was then due to the said Alanson Palmer's assignees, \$120,76, by the

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terms of the contract or lease, for the rent of the premises from 1st May, 1836, to 1st May, 1837, being for balance due *on first year's rent*. (Signed) "Alfred Clemons, one of A. Palmer's assignees." The plaintiffs also produced a *distress warrant*, dated 27th June, 1837, directing any constable of the town of Buffalo to distrain the goods and chattels of the plaintiffs, for \$120,75, "being for amount of rent due to *me* for the use of the said premises," on 1st May, 1837, as appears by the affidavit hereunto annexed: this warrant was signed "Alanson Palmer, by Alfred Clemons, one of his assignees." The plaintiffs then proved, that by virtue of the warrant the defendants *levied* upon property in the possession of the plaintiffs of the value of \$1500. The property, however, was not removed. Here the plaintiffs rested. The defendants then proved an acknowledgment of McKibben, one of the plaintiffs, that he and his partner had taken the store from Palmer, *for four years from 1st May, 1836 at an annual rent of \$600*: this evidence was objected to by the plaintiffs as inadmissible under the notice accompanying the plea; but the objection was overruled. The defendants also proved that the plaintiffs took possession of the demised premises on 1st May, 1836; and produced in evidence an *assignment* from Palmer to Alfred Clemons and Horatio Warren, dated 4th May, 1836, conveying to them all his property for the benefit of his creditors. The value of the property was conceded to be \$1500, and the balance of rent due to be \$120,75. The judge charged the jury that the plaintiffs were *not* entitled to recover. The jury found for the defendants, assessing the value of the property at \$1500, and certifying the amount of rent due to be \$120,75. The plaintiffs, on a bill of exceptions, moved for a new trial.

W. L. G. Smith, for the plaintiffs.

J. G. Masten, for the defendants.

[*483] **By the Court, Cowen, J.* The notice accompanying the plea did not mislead by stating that the defendants were *bailiffs to Alanson Palmer*. They could not take any authority from him; but that was not the objection, nor was it that the notice varied from the truth. It seems to have been merely that the notice was inconsistent in stating a distress by Palmer's bailiffs for a rent which the same notice stated to be due to his assignees. Such a notice would not mislead the plaintiffs. Particulars enough were stated to show them the premises and rent in respect to which the distress was made. It is enough in a notice of special matter, that it fairly apprise the plaintiff of the material facts on which the defendant means to insist. *Chamberlain v. Gorham*, 20 Johns. R. 746, *on error. Id. 144, S. C.*

To the objection that the warrant claimed the rent to be due to Palmer,

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while the affidavit stated that it was due to the assignees, nearly the same remarks are applicable. The warrant was sufficiently plain on the whole as to the rent for which the distress was to be made. So of the affidavit. This claims a balance of rent for the true year, and is not vitiated by previously averring that the lease was for four years.

No objection appears to have been taken that the warrant was in fact issued in the wrong name, or signed by the wrong person. It undoubtedly went in the wrong name. The rent appears to have been assigned before it accrued, and the warrant should in strictness have been in the name or under the authority of the assignees to whom the rent passed, and have been so expressed. They had more than a mere equitable title. However, the warrant was signed with Palmer's name, by one of the assignees; and had the form of the signature or the actual authority under which it issued been called in question, they might have sustained the proceeding by more formal documents or other evidence.

Some objections of a more plausible character remain; but I think they are unavailable for the plaintiffs. The lease was in itself void, as being a parol one for four years. But the plaintiffs actually entered and enjoyed for one year. The entry and enjoyment would alone [*484] have made them liable for use and occupation, and the parol agreement would have shown the amount to be recovered. It has also often been held, that under such circumstances, the lease is in effect but for one year, or from year to year, according to the time of enjoyment. It follows that the parol agreement, though void as a lease, may yet be resorted to as evidence to make the rent for the year certain, and thus confer a right of distress on the landlord. *Schuyler v. Leggett*, 2 *Cowen*, 260. *The People v. Rickert*, 8 *id.* 226. The case of *Prindle v. Anderson*, 19 *Wendell*, 391, does not at all conflict with those in my reports. On the contrary, *Schuyler v. Leggett* is expressly recognized. The course of proof by such cases is the obvious one of making out an oral lease for a year by circumstantial testimony.

No doubt there is a variance between the notice and proof in respect to the time of payment, which would have been fatal within the principle of *Bristow v. Wright, Doug.* 665. The notice relies on rent payable quarterly, while the proof leaves it, in effect, payable at the end of the current year. No stipulation to pay quarterly was shown. The variance, however, as remarked by the learned judge, not operating prejudicially to the plaintiffs, might, as it was, be properly disregarded. It presented a case proper for amendment. See the authorities referred to in *Weed v. The Saratoga and Schenectady R. R. Co.*, 19 *Wendell*, 541, to 543. The variance supposed to exist between the notice of special matter and the affidavit, the for-

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mer asserting a lease for one and the latter for four years, might, if necessary, be obviated on the same principle.

New trial denied.

[*485] *WEBBER & HAND vs. GAY & EYSAMAN.

An attachment issued under the *non imprisonment act* is void, if it be made returnable more than four days after its date, although the proceeding be under § 34 of that act, allowing such process against a debtor *about to remove his property* from the county.

A constable, however, executing an attachment returnable more than four days after its date, is protected, although he *knew* the facts limiting the return of the process to four days, provided that in other respects the process be good on its face.

THIS was an action of *replevin*, tried at Herkimer circuit in April, 1840, before the Hon. JOHN WILLARD, one of the circuit judges.

The action was brought by A. B. Webber and I. Hand, for the taking and detaining of four horses and two sets of harness, *mortgaged* to them on the 12th July, 1836, by D. S. Webber and E. Mansfield. The property was at the time in the possession of *Gay*, one of the defendants; it was demanded of him by the plaintiffs, but he refused to deliver it up, alleging that he had a demand against the mortgagors for the keeping of the horses. On the 30th July, *Gay* sued out an attachment against the mortgagors, by virtue of which the property in question was seized; whereupon it was replevied by the plaintiffs. In the *affidavit* upon which the attachment was issued, *Gay* stated that *D. S. Webber* and *E. Mansfield* were indebted to him in the sum of \$50, over and above, &c. and that he believed that they *were about to remove some of their property* with intent to defraud their creditors, and that they *were not residents of the county of Herkimer*, (to a justice of which county the application for the attachment was made.) The warrant was made returnable *seven days* after its date. *Eysaman* was the constable who served the attachment. He was present when the application for the process was made, and became the *surety* of *Gay* in the bond executed by him upon that occasion: which bond was in the penalty of \$100. The defendants pleaded *separately*; and in pursuance of a notice accom-

[*486] panying their pleas, offered to prove that the mortgage under which the plaintiffs claimed was fraudulent and void as against *Gay*, one of the defendants—he being a *creditor* of the mortgagors, and as such having sued out the attachment. The judge ruled that the defendants being *non-residents of the county of Herkimer*, the attachment was void in being made returnable more than four days after its date; that *Eysaman*, the constable, *knowing* the fact that the defendants named in the attachment

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were non-residents of the county, was not protected by the process; and that consequently neither of them could allege fraud in the mortgage. The jury, under the direction of the judge, found a verdict for the plaintiffs. The defendants ask for a new trial.

L. Ford, for the defendant.

T. Jenkins, for the plaintiff.

By the Court, NELSON, Ch. J. It was decided in *Clark v. Luce*, 15 *Wendell*, 479, that an attachment under the 33d section of the act of 1831, *Statutes of 1831*, p. 403, might issue against non-residents of the county without any affidavit. In terms, however, the attachment must be returnable in not less than two days, and must not run more than four days from its date. And if a defendant be proceeded against otherwise, the statute declares *the justice shall have no jurisdiction*.

The counsel for the defendants insist that in this case the attachment was issued under the 34th section, and if so, the return is undoubtedly regular. If it may be issued against non-residents of the county under this section, the preliminary steps before the justice are probably sufficient, though the affidavit is quite meagre. That section provides, that in addition to the cases in which a suit may be commenced under the revised statutes by attachment before a justice, (this is the import,) it may be so commenced for the recovery of a debt not exceeding \$50, whenever it shall satisfactorily appear to the justice, that the defendant is *about to remove* from the county *his property, &c.* whether such defendant be a resident of the [*487] state or not. The language doubtless is broad enough to embrace the case of non-resident defendants; but I think it should be construed as intended to apply, exclusively, to residents of the county. The previous section had already provided for the former, and, as has been held in *Clark v. Luce*, authorizes the issuing without any preliminary proceedings. The 34th section, therefore, could not have intended to prescribe a like remedy, fettered with these proceedings, for the sake of affording the alternative to the creditor; it would have been worse than useless. As some of the previous provisions recognized a distinction in legal proceedings before the justice favorable to residents of the state, the clause was, probably, thrown in for the purpose of repudiating it in the particular case. The limitation of time in the return of the attachment against non-residents, was to afford a speedy opportunity for trial; was intended for their convenience, and should be upheld if possible, consistent with a reasonable interpretation of the several provisions.

2. I think the learned judge erred as to the officer. I am not aware the

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court has ever looked beyond the process with a view to see if he was cognizant of the irregularity. The point was thrown out by the chancellor in *Parker v. Walrod*, 16 *Wendell*, 519, but no definite opinion expressed. The general rule as there admitted is, if the justice has jurisdiction of the subject matter, and if the process is regular upon its face, he is protected. To go beyond this, would lead to a new and troublesome issue, which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible ; to require them to act or not, at their peril, as they may be supposed to know or not the technical regularity of the party or magistrate, seems to me an innovation upon previous cases, and against the reasons and policy of the rule. The experience of the officer will soon enable him to determine whether the process is in regular form or not, or he can readily obtain the necessary advice ; but he must be presumed wiser than [*488] the magistrate if even a knowledge of the proceedings would enable him to decide correctly, if they happened to be erroneous. I think a new trial should be granted as to the officer.

Ordered accordingly.

HOWELL & STRONG *vs.* BABCOCK'S EXECUTOR.

Where a testator is indebted and dies within six years after the accruing of a cause of action against him, and within eighteen months after his death a suit be brought against his executor who pleads the *statute of limitations*, the proper course for the plaintiff is, to reply that the cause of action did accrue within six years, and not to plead the facts specially that the cause of action accrued within six years before the death of the testator, and that the suit was commenced within eighteen months after that period. On such general replication, in the computation of time the eighteen months are excluded.

So in an action by an *executor* or *administrator*, where twelve months have elapsed since the death of the testator or intestate, and the *statute of limitations* is pleaded, it seems that it is not necessary for the plaintiff to reply specially the time allowed by law for the bringing of the suit, but may reply generally.

DEMURRER to replication. The plaintiffs declared in *assumpsit* for that the testator was indebted to them for work, labor and services bestowed by them as attorneys and counsellors in and about his business. The defendant pleaded *actio non accredit infra*, &c. The plaintiffs replied that the causes of action in the declaration mentioned accrued to them within six years next before the death of the testator, and that the action was commenced within eighteen months next after his death, concluding with a verification and prayer of judgment. The defendant demurred, assigning as special causes of demurrer the following : 1. That the replication is double in offering in

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issue two distinct matters, viz. the truth of the allegation in respect to the *six years* and the *eighteen months*; 2. That it does not traverse or deny the allegation in the plea that the suit was not commenced within six years, &c.; and 3. That it concludes with a *verification*, instead of concluding to the country.

*D. B. Prosser, for the defendant.

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Z. A. Leland, for the plaintiffs.

By the Court, COWEN, J. This demurrer raises the question on the form of pleading and replying to a plea of the statute of limitations, where the party indebted dies within six years after the cause of action against him accrues, and the action is brought within eighteen months after his death. The 2 R. S. 224, 2d. ed., § 18, adopts the old law, and requires the ordinary plea in all cases. But *id.* 365, § 8, provides that the term of eighteen months after the death of any testator or intestate, *shall not be deemed any part of the time limited by law*, for the commencement of actions against executors or administrators.

On reflection, we do not think the latter section was intended to alter the form of pleading. Where the time intermediate the cause of action accrued and the commencement of the suit, therefore, is seven years and six months, or more, the defendant should plead, as he has done in this instance, the common plea. *Vid. Huntington v. Brinckerhoff*, 10 Wendell, 278, 283, 4. And if the plaintiff mean to contest the time, he should reply that the cause of action did accrue within the six years. The statute then comes in and directs the mode of computation. It declares that the eighteen months shall not be deemed a part of the six years pleaded; in other words, the six years are not complete, in the special case, unless the whole time be seven years and a half. The statute is one of evidence or computation. It is not like the statute creating an exception in case of infancy or coverture, &c. These exceptions, it is admitted, must be replied, as was done in *Chandler v. Vilett*, 2 Saund. 117, c. 120. A direct issue on the time, keeping the disability out of view, would admit evidence of time only. The disability, or cause of exception, could not appear upon the record without being specially replied. So where the defendant is beyond sea. *Vid.* 10 Wendell, 284. But in an action against an executor or administrator, a possible case for the statute appears on the face of the declaration. The "bar is still one of six years, but it is that time exclusive of the [*490] eighteen months. This shall not, says the statute, be deemed a part of the time limited. You must, to satisfy your plea in such a case, make out six years intermediate the day when the cause of action accrued,

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and the day when the suit was commenced, beside the eighteen months running immediately after the death of the debtor. That is the time intended by the words of the plea, six years, &c. in such a particular case.

A similar phraseology is introduced into the 9th section. 2 R. S. 366, 2d ed. This provides that in actions by executors or administrators, a certain time not exceeding twelve months from the death shall not be deemed any part of the time limited by any law for the commencement of actions. In other words, the time shall be the same, viz. six years; but this shall be reckoned exclusively of certain time which the legislature thought ought not to be counted. The plea is to be read, in effect, as if it said six years, &c. exclusive of such and such time. It is as if the statute had said such a plea shall be so read or construed. A special replication was spoken of in *Huntington v. Brinckerhoff*, as proper under § 9, upon the analogy to the practice of replying disability. *Vid. 10 Wendell*, 284. The point was not before the court. I have already endeavored to show that the analogy is incomplete. While a general and direct issue seems to be admissible on principle, and conformable to the peculiar language of the revised statutes, it is more desirable on account of its simplicity.

If the views which I have taken be correct, it follows that the replication is, in the case at bar, defective for the second and third causes assigned by the special demurrer. It should have taken the usual simple issue to the country, viz. that the cause of action did accrue within six years, &c.

Judgment for the defendant.

[*491] *THE PEOPLE, on the relation of the Commissioners of Highways of Cortlandville, vs. THE JUDGES OF CORTLAND COUNTY.

The act relative to highways, authorizing commissioners to ascertain, describe and enter of record roads used as public highways for 20 years, confers no authority upon the commissioners to adjudge what was originally intended in relation to the width or location of the road, any further than such intention is manifested by actual user, and they cannot enlarge the width of the road or change its location.

But where commissioners did, under the above authority enlarge a road by describing it as *three rods wide*, when in fact its width never exceeded *two rods*, and also *changed its location*, it was held that the party aggrieved had no remedy by appeal to the judges of the county in which the road is situated: *so held*, by Judges BRONSON and COWEN; the CHIEF JUSTICE dissenting.

Whether the party aggrieved in such case has a remedy, and if so, what remedy, *quere.*

CERTIORARI to three judges of the county of Cortland. On the 6th July, 1839, the commissioners of highways of the town of Cortlandville, made an order, adjudging that a certain road in that town, particularly des-

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ignated, *had been used as a public highway for twenty years, but had not been recorded*; and they thereupon proceeded to *ascertain, describe and enter the road of record* in the town clerk's office. *Nathan Peck*, conceiving himself aggrieved by the determination of the commissioners, appealed to the judges, who, after notice and hearing of the parties, made an order on the 15th November, 1839, *reversing in part*, the order of the commissioners.

From the return, it appears that the commissioners in their order, declared the road to be *three rods wide*, and they insisted before the judges that this was the width "originally intended." The judges say it was proved before them that the road never was opened more than *two rods wide*—it now runs where it has always run, and Peck's fences on the south side of the road now stand on the same spot where they have always stood since the road was opened; that the survey and record of the road by the *commissioners has *altered* the road nearly the width of it— [*492] carrying the south line nearly one and a half rods into the cultivated fields of Peck, and running it through his garden of the growth of more than four years, and also through his barn and sheds. The judges reversed so much of the order of the commissioners as had the effect to alter the south line of the road, and made it encroach, on the lands and premises of Peck.

H. Ballard, for the relators.

W. H. Shankland, contra.

The following opinion was delivered:

By BRONSON, J. The legislature has enacted, what the common law had already declared, that roads, although not recorded, which have been used as public highways for twenty years, shall be deemed public highways. 1 R. S. 521, § 100. And it is the duty of the commissioners in the several towns, to cause such roads to be *ascertained, described and entered of record* in the town clerk's office. *Id.* 501, § 1, sub. 3. This provision does not authorize the commissioners to say what was "originally intended," either by the owner of the soil or any one else, in relation to the width or location of the road, any further than such intention has been manifested by permitting the way to be used. It is a power in relation to the road *as it actually exists*, and *has existed* for the last twenty years. It does not authorize the commissioners to create or enlarge, but only to perpetuate the evidence of a public right. Both the *extent* and the *fact* of dedication depend on the user; and the public must take *secundum formam doni*. On

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the facts returned by the judges, it is quite clear that the commissioners exceeded their powers, and the only question is, whether Peck had a remedy by appeal.

There may be an appeal to three of the county judges from any determination of the commissioners, “either in *laying out, altering or discontinuing*, or in refusing to lay *out, alter or discontinue* any road.” *Id.* 518, § 84. The right of appeal is not given in general terms, but the cases in which it may be exercised are specially enumerated. That enumeration, so far as it goes, corresponds precisely with the powers conferred on the commissioners. They have authority to *lay out alter and discontinue* roads. *Id.* § 1, 2. But the commissioners have many other powers, and among the number, that of causing certain roads “to be ascertained, described and entered of record,” § 1, to which the right of appeal has not been extended.

In relation to the section giving an appeal, the word “discontinuing” can call for no remark. It seems almost equally clear that the word “altering” does not reach this case. The commissioners did not profess to make any change in the road, but simply to *describe* and *record* it. I may add, that the power to *alter*, and that to *record*, are not only given by distinct clauses of the statute, but they are conferred for different purposes. The one is to be exercised when the road is deemed “inconvenient;” the other, when the road either has not been “recorded,” or is not “sufficiently described.” *Id.* § 1, sub. 2, 3. The power to *alter*, is given for the purpose of making the road better by changing its site; that to *record*, for the purpose of preserving a written memorial of the road as it already exists.

As to the remaining words—“*laying out*”—they seem obviously to mean something different from that of describing and recording a road as it already exists. But that is not all. There is no reason for understanding these words differently where they occur in different parts of the statute. They were evidently used in the section giving an appeal, because they had been used in the sections conferring power on the commissioners and regulating its exercise. The power of the commissioners is, “*to lay out* on actual survey such new roads in their respective towns as they may deem necessary and proper. *Id.* § 2. And in the fourth article, p. 518, the words “*to lay out*,” “*laying out*” &c. will be found in almost every section, and wherever they occur they were manifestly used in reference to “the opening or establishing a road where none existed before. We cannot make them apply to the describing and recording of an old road, without doing violence to the language of the statute.

There was some reason for not making the right of appeal co-extensive with the powers of the commissioners. In opening new roads, and altering and shutting up old ones, the commissioners act judicially, and in matters ma-

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terially affecting the interests of individuals. But in describing and recording a road which has already become public by twenty years' use, they perform little more than a ministerial duty, and third persons cannot be materially affected, for the reason that the owner has already dedicated the soil, and nothing is wanting but record evidence of the existing, public right. So where a road already "laid out, but not sufficiently described," is described and entered of record by the commissioners, *Id. § 1, sub. 3*, they do little more than to perfect and preserve the evidence of an existing public right, and no appeal has been given.

It is true that the commissioners, under colour of recording a road as it already exists, may, as seems to have been the case in this instance, describe and include lands which never formed a part of the highway. Indeed, they may describe and record a highway where none has ever existed. But we must not suffer ourselves to be misled concerning the right of appeal, which depends on the statute, by the fact that the commissioners may abuse their authority. In this case, they have not professed either to lay out or alter the road, but simply to ascertain, describe and record one. If, in doing this, they have encroached on lands which do not belong to the highway as it had been actually opened and used, the owner probably has a remedy in some form; but it is not by appeal. Whether he should proceed by *certiorari* to the commissioners, whether, in all the forms in which the question may arise, he may insist that the act of the commissioners is void on showing that they exceeded their jurisdiction, are questions not now before us.

Although an injury had been done to Peck, who prosecuted the appeal, I think the judges had no jurisdiction to *redress the [*495] wrong, and their proceedings must consequently be reversed.

Mr. Justice COWEN concurred.

The CHIEF JUSTICE dissented, and delivered the following opinion: "The only question to be determined is, whether the judges have jurisdiction to entertain an appeal under the highway act in this particular case.

The commissioners are empowered to cause such roads as have been used for twenty years, but not recorded, to be *ascertained, described and entered of record in the town clerk's office*, 1 R. S. 500, § 1, sub. 3; and in § 104, p. 517, it is declared, that all roads not recorded which shall have been used as public highways for twenty years or more, shall be deemed public highways.

The commissioners of Cortlandville having, on the 6th July, 1839, determined that the road in question had been in use twenty years, proceeded to ascertain and describe the same, and cause it to be surveyed and recorded. An appeal was taken to the judges complaining of a *part* of the proceed-

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ings of the commissioners, agreeably to the 88th § of the act, p. 514, and which they reversed. The 88th § provides that every person who shall conceive himself aggrieved by any determination of the commissioners, either in laying out, altering or discontinuing, or in refusing to lay out, alter or discontinue any road, may, at any time within sixty days, appeal to any three of the judges, &c.

The argument against the power of the judges is, that the proceeding to ascertain and enter of record a road in use twenty years, is not a *laying out* of a road within the meaning of this section. The point is not free of difficulty, but, upon full consideration, I am inclined to think the doings of the judges should be sustained. The act appears to contemplate two modes of laying out highways: *one* by the intervention of a jury of freeholders, and the other by the commissioners alone; an instance of the latter is, where the entire line of the road passes through unimproved lands. The [*496] assistance of the jury is not then called in, *see art. 4, "p. 510;* and without any forced construction, we may, I think, regard as another instance in which they may act alone, the survey, ascertainment and recording of a road which they determine has been used for twenty years; it is practically, and in effect, a *laying out* of the same. They first examine and adjudge the length of time the road has been in use—if the twenty years, then its line and boundaries are ascertained, fixed and recorded as in other cases. The record is, doubtless, as conclusive upon all the world as if it had been laid out anew in any other mode; indeed it is so decided. *Colden v. Thurber, 2 Johns. R. 429.*

The reasons for an appeal are as strong in this case as in any other; and it may be added, also, that the act contemplates the laying out of the road by these officers without any application to them. § 59, *p. 510.*

Upon the whole, I am of opinion here was a determination in the laying out of a road within the meaning of the statute authorizing an appeal to the judges, and that their proceedings should therefore be affirmed."

But a majority of the court being of a different opinion, the proceedings of the judges were *reversed.*

BOWEN vs. D. C. & W. ARGALL.

In the publication of the certificate of the terms of a *limited partnership*, it was held that a mistake in the publication of the names of the partners, as ARGALE for ARGALL, would not vitiate the publication. If there be doubt whether the mistake might not have tended to mislead, the question should be submitted to a jury.

A publication of the terms of partnership *within three days* after the registry thereof, was held a compliance with the requirement of the statute, that the same be published *immediately, &c.* provided that the publication be *within the first seven days after the registry.*

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So the statute is complied with, if the terms of partnership be published in a *daily paper* once in each week for six successive weeks: each publication being deemed to represent seven days.

Whether placing the *general partner* upon a footing with *other creditors* in an assignment made by an insolvent firm, will be deemed contrary to the statute, *quere*: be that however as it may, such a provision will not convert *a *special partner* into a *general* [*497] *partner*, and render him liable accordingly.

An error in the publication as to the amount of the sum advanced by the *special partner*, is unavailable on a writ of error, if no objection to the publication was taken on the trial of the cause.

ERROR from the New-York common pleas. *Henry F. Bowen* brought an action of *assumpsit* against *David C. Argall* and *William Argall*, and declared against them for goods sold and delivered, and also on the common money counts. To the declaration was attached a copy of a promissory note made by *David C. Argall* alone, dated 21st October, 1835, for the sum of \$345, payable to the plaintiff six months after date. The declaration was served upon *William Argall* alone, who put in a plea of *non-assumpsit*. The plaintiff claimed to recover against *William Argall*, as a member of a *limited partnership* carrying on business under the name of *David C. Argall*, on the ground that the *act respecting limited partnerships* had not been duly complied with, and that in other respects the defendant *William Argall* had rendered himself liable for the debts of the partnership. The plaintiff produced in evidence the original certificate of partnership, which was in these words: "This is to certify, that the undersigned have in pursuance of the provisions of the revised statutes of the state of New-York, formed a limited partnership under the name or firm of *David C. Argall*; that the general nature of the business to be transacted is that of buying and vending dry goods in the city of New-York; that *David C. Argall*, of said city, is the *general partner*, and *William Argall*, of said city, the *special partner*; that *William Argall* hath contributed the sum of *two thousand dollars* as capital towards the common stock, and that the partnership is to commence on the 31st August, 1835, and is to terminate on the 31st August, 1837." The certificate was dated on the 31st August, 1835, and was signed by the partners. On the 14th September, 1835, it was acknowledged before an associate judge of the court of common pleas of the city and county of New-York, and *David C. Argall* made affidavit before the same judge that the sum specified in the certificate had been actually and in *good [*498] faith paid, *in cash*. On the day last mentioned the *clerk* of the city and county of New-York made an order that the notice required by law to be published, should be published in two newspapers, viz. *The New-York Times* and *Evening Post*, printed in the city of New-York; and on the same day the clerk recorded the certificate, &c. in his office. The plaintiff then, after proving the signature of *David C. Argall* to the note, and reading the same

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in evidence, proved that on the 16th May, 1836, *David C. Argall*, describing himself as transacting business under a limited partnership in the name of David C. Argall, made an *assignment* of all his stock in trade for the benefit of his creditors, *giving a preference* to certain creditors, among whom was his partner, *Williams Argall*, to whom it was stated he was indebted for *indorsement* in the sum of \$519,01, and for *cash lent* \$35, and providing besides for the repayment to William Argall of the sum contributed by him as capital towards the common stock.

Evidence was then given by the plaintiff for the purpose of showing that *William Argall* had concurred in or assented to the assignment thus executed by his general partner; and also that he had transacted business on account of the partnership in violation of the provisions of the statute on this subject. This evidence was met by rebutting testimony on the part of the defendant. The plaintiff next offered in evidence the original files of the *New-York Times* and *Evening Post* to show that the terms of the partnership had not been duly published. The defendant objected to their reception as evidence, insisting that the affidavits of the publication on file in the office of the clerk of the city and county of New-York were conclusive evidence of the publication, and that no other evidence could be received, and accordingly produced the affidavits from the files of the clerk's office: which stated that the notice or certificate of partnership had been regularly published in the *Evening Post* and *New-York Times* once in each week for six weeks successively, commencing on the 17th day of September, 1835. The sum specified in the cer-

title as published in the *Evening Post* was *five thousand dollars*, [*499] instead of *two thousand dollars*, and the names of the partners as specified in the certificate and as subscribed thereto were *DAVID C. ARGALE* and *WILLIAM ARGALE*, instead of *DAVID C. ARGALL* and *WILLIAM ARGALL*. The plaintiff again offered the original files of the papers in evidence, which though objected to by the defendant were received by the judge. From these papers it appeared that the notice or certificate of partnership had been published in the *daily* papers of the *Post* and *Times* but *six times*, to wit, on the 17th and 24th days of September, and on the 1st, 8th, 15th and 22d days of October, making in all a publication of only thirty-six days including the first and last days of publication and the intermediate time.

On the part of the defendant it was proved that on the 29th June, 1835, the parties being advised that the assignment of the 16th May preceding was invalid, Curtis, the assignee, re-assigned the property to *David C. Argall*, who on the same day executed a new assignment of the same property to Curtis. By this latter instrument no preferences were given, but the proceeds of the property were directed to be equally distributed among all the creditors of the assignor, and after satisfying such debts, to pay *William Argall* the sum contributed by him to the common stock. In the list of creditors, however,

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the name of *William Argall* was inserted, and the sum of \$519,01 was stated as due to him for *endorsements* made by him. The plaintiff objected to the introduction of this testimony, but it was received by the judge.

The plaintiff claimed to recover upon the following grounds: 1. That the publication of the terms of the partnership were insufficient: that in the publication in one of the papers the partners were named *Argale* instead of *Argall*; that the publication was not made *immediately* after the registry of the certificate; that it was not published *daily* for six weeks, and was not published for a sufficient length of time; 2. That *William Argall* had transacted business on account of the partnership; 3. That he had concurred in or assented to the assignment of May, 1836; 4. That the first assignment could not be rescinded and that "consequently" [*500] both the re-assignment by the assignee and the second assignment were void; and that the second assignment was void also, on the ground of its making a provision for *William Argall*.

The judge charged the jury that the certificate containing the terms of the partnership was sufficient, and had been duly published; the questions as to whether *William Argall* had *transacted business* on account of the partnership, and whether he had *assented* to the assignment of May, 1836, he submitted to the jury upon the evidence of the case. As to the assignment itself, he instructed the jury that it was fraudulent as to creditors and voidable by them, but was valid as between the parties to it; that a voidable deed however might be made good by matter *ex post facto*; that under the assignment of *May*, 1836, the title to the property passed, and a trust was created, but as none of the creditors accepted the assignment and no payments had been made under it, he perceived no objection to the re-assignment by the assignee, nor to the second assignment which were executed to relieve the first assignment from what was objectionable and illegal. That in his opinion the provision of the statute that a *special partner* shall not under any circumstances be allowed to claim as *creditor*, until the claims of all the other creditors of the partnership shall be satisfied, does not apply to an endorsement for the firm, but has reference to the capital paid in by the special partner. The plaintiff excepted to the charge. The jury found a verdict for the defendants, upon which judgment was entered. The plaintiff sued out a writ of error.

C. Judson, for the plaintiff, insisted that the publication of the certificate of the terms of the partnership was insufficient; that the partners were named *Argale* instead of *Argall*; that the sum paid in by the special partner was stated to be \$5000 instead of \$2000; that the publication was not *immediately* after the registry: the registry having been made on the *fourteenth* day of September, and the publication not until the *seventeenth*; that

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[*501] the certificate ought to have been published *daily* for 36 days, which would have "embraced six weeks, except Sundays, and at all events should have included six weeks between the first and last publication: to this point the counsel cited 1 *Wendell*, 90.

He also insisted that the *second assignment* was void as to creditors, and cited 6 *Paige*, 582. And that the charge of the judge was erroneous.

W. S. Sears, for the defendants in error.

By the Court, COWEN, J. No doubt the provisions of the 1 *R. S.* 753, 2d ed. prescribing the manner of instituting limited partnerships, must be substantially complied with, or the creditors may treat the members of the firm as general partners.

The objections in this case to the forms of institution, all arise upon the 9th section of the statute, which provides that "the partners shall publish the terms of the partnership when registered, for at least six weeks immediately after such registry, in two newspapers to be designated by the clerk of the county in which such registry shall be made; and to be published in the senate district in which their business shall be carried on; and if such publication be not made, the partnership shall be deemed general."

1. The notice in the *Post* was that David C. *Argale* and William *Argale*, both of the city of New-York, had entered into the partnership. It did not mention their place of residence more particularly, nor their place of business at all. The notice was signed David C. *Argale* and William *Argale*. It did not contain the name of *Argall* at all, nor was it shown that they were known to the public by both names. By the 4th, 5th and 6th sections of the statute, in order to form a limited partnership, the members are first to sign and acknowledge, and cause to be filed and recorded at large in the clerk's office of the county where their principal place of business shall be situated, a certificate, which shall contain, among other things, the names of all the general and special partners, distinguishing which are general and which are special partners, and their respective places of residence. Then

[*502] the 9th section directs the manner of publication. "The partners shall publish the terms of partnership. The form of notice is not given, but the object of it is plain; that the public may be informed not merely of the terms, but the parties to the contract of partnership. Their names alone would doubtless satisfy the words and spirit of the section, provided they be truly given. In this instance they are not; but names very nearly the same, with the city of their residence, are given as a substitute. The christian names are correct; and the mistake doubtless arose from the printer mistaking the final L in the manuscript surnames for an E, and thus being led to print the surnames so as to give a slightly differ-

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ent sound. It is extremely difficult to imagine how the public could be misled by names so very nearly the true ones, accompanied with the superaddition of residence. Undoubtedly the true question is whether the mistake was, under the circumstances, calculated to mislead. In a case of doubt, the question should be put to the jury upon the circumstances. In this case, however, I apprehend it was unnecessary. I think it furnished a case for presuming that no one was misled, at least till the contrary was shewn.

2. It is said the notice was not published *immediately* after the registry; that the parties waited three days. I apprehend the statute does not mean to speak of *time* or *days* immediately following the registry, but of the *six weeks immediately after*. The latter are its precise words. A publication in the first week immediately ensuing the registry, duly followed up by a repetition for the next five weeks, would seem to satisfy it in this respect.

3. A publication once in each of the ensuing *six weeks* is sufficient. The statute counts by weeks, taking one day, no matter which, if according to the common course of weekly publication, in each week. Thus, the full term of 42 days and more were made out in this case. One publication in each six consecutive weeks of seven days each, the first publication being within the first seven days after the registry, satisfies the statute in respect to time of publication. Each single publication in each week represents and should be reckoned for seven days. The publications are to "be in any two papers of the senate district, and by mentioning [*503] weeks, the statute has an obvious reference to hebdomadal publications, which are those in prevalent practice, when considered in respect to the whole state. Notices to creditors in cases of insolvency stand on a different phraseology. The notice is there of *a time* to show cause, *after the expiration of the six weeks preceding publication*. *Vide 1 R. L. of 1813, p. 462, § 5.* The publication must be for *six successive weeks*, once for each week in both cases, according to the ordinary course of publication. But in the case of insolvency, the weeks must be full before the time of showing cause. The anonymous case cited from 1 *Wendell*, 90, must have gone on this distinction. The learned judge who tried this cause in the court below, (the late Judge Irving,) must have been eminently qualified to decide upon the practical and common understanding of clauses like the present when used in statutes. Much must depend on such understanding, in fixing its construction; and I cannot but regard his decision as of considerable weight in favor of what I conceive to be the meaning on its face, and in the light of my more limited observation in this respect. On the whole, we think the objections grounded on the want of sufficient publication were properly overruled.

With regard to such interference of William Argall in the business con-

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cerns of the firm as would work a forfeiture of the privileges of a special partner, the judge laid down the law to the jury in the terms of the 17th section of the act, and referred it to them whether the evidence brought him within those terms. I have looked through the evidence, and am of opinion it is precisely of that character which called for such a reference. He was also clearly correct in submitting the question to the jury whether William Argall had concurred in or assented to the first assignment, another act, which, according to § 22, would have been fatal to his special character, and subjected him as a general partner. There was no direct, unimpeachable and conclusive testimony on either of these heads; none to which the judge could, as matter of law, attach any definite influence.

[*504] In *Mills v. Argall*, 6 *Paiye*, 577, 582, the chancellor held "that this second assignment was contrary to the 23d section of the statute, inasmuch as it provided that William Argall should be paid his endorsement rateably with the other creditors. The section cited declares that, in case of the partnership becoming insolvent, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors shall be satisfied. The judge charged that this provision is confined, in its true construction, to the special partner's claim for capital paid in. It is not now necessary to pronounce whether this or the chancellor's construction was right; for I see nothing in the act declaring as a consequence of an assignment or other act providing for the forbidden preference, that the special partner should thereby become liable as a general one. The only consequence of the construction contended for by the plaintiff in error would, therefore, be the avoiding of the particular provision for the benefit of the other partnership creditors, in a proceeding adapted to enforce the claims of preference.

The objection as to the variance between the \$2000 actually contributed, and the sum mentioned as contributed in the advertisement, viz. \$5000, was not made a point at the trial; and therefore is not now noticeable. Very likely, as suggested by the counsel for the defendant in error, it has arisen from a clerical mistake in the bill of exceptions, or in copying. That it may have arisen in either way, is a material argument why the settled practice should be adhered to, of refusing to notice any point not presented specifically at the trial.

On the whole, we are of opinion that the judgment of the court below should be affirmed.

CASES
DECIDED IN THE COURT
FOR THE CORRECTION OF ERRORS
OF THE
STATE OF NEW-YORK,
In the Year 1840.

THE NEW-YORK INSURANCE COMPANY, *appellants*, and ROULET and others, *respondents*.

Where a cargo of merchandise, which was insured, was seized and condemned by the French government under the *Berlin* and *Milan* decrees, and a compromise was subsequently made between the underwriters and the assured, by which the latter accepted from the former \$5000 in satisfaction of their claim against the underwriters, which was for \$15,000, and surrendered the policy, but did not assign or cede the right to claim indemnity from the French government, *it was held*, on the underwriters subsequently obtaining \$5000 under the convention between the American and French governments, providing indemnity for spoliation upon our commerce, that the award of the *commissioners* under the treaty, giving the money to the underwriters instead of the assured, was not conclusive as between the parties, and that the money thus obtained was held in *trust* for the assured, and the underwriters were decreed to pay over the same.

It was also held, that though an *action at law* might have been sustained for the recovery of the money, a *bill in equity* was proper; the jurisdiction of the courts in a case like this being concurrent.*

APPEAL from chancery. The respondents filed a bill in chancery before the vice chancellor of the first circuit, in which they stated that John S. Roulet, Joseph Icard and *Gurdon S. Mumford, in No. [*506] vember, 1807, shipped at New-York a cargo of coffee, sugar and logwood, on a voyage to Marseilles in France, of which cargo they were joint owners, and the invoice cost was \$57,579,18; that the New-York Insurance Company insured \$15,000 of the cargo at a premium of 7 per cent. That the ship and cargo were seized in July, 1808, at Marseilles, under some decree of the emperor of France; that the owners gave security for the appraised value of the cargo, to wit, in the sum of \$104,047, to be paid in

* Decided 26th December, 1840.

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case of condemnation. That the cargo was subsequently condemned and the above sum paid. That a claim was made by the owners upon the insurance company for the whole amount insured by them, and an offer made to abandon to the company the right of recovery against the *French government* for the loss in the proportion of \$15,000 to the whole amount insured on the cargo. That the company declined to accept the abandonment and to pay the loss. That a *compromise* was thereupon made, by which the company agreed to pay on account of the loss the sum of \$5000, and the policy to be given up by the assured; which compromise was carried into effect in March 1809, by the payment of that sum, deducting the premium, and the policy surrendered. The complainants averred that there was *no assignment or cession* of right to recover the subject insured or indemnity therefor, made by the assured or *demanded* by the company. That upon the appointment of commissioners under the convention between the United States and the king of the French, bearing date 4th July, 1831, claims were preferred on behalf of *Roulet*, and the estates of *Icard* and *Mumford*, (the two latter individuals having died,) for an allowance under the provisions of the convention for the loss sustained by the seizure and condemnation of the cargo and the compulsory payment of its appraised value; that the New-York Insurance Company also presented a claim to the commissioners for the sum of \$5000 paid by them as *insurers* as aforesaid; that on 31st December, 1835, the commissioners allowed for the whole loss on the cargo the aggregate sum of \$50,940, and of that sum *awarded* to the New-York Insurance [*507] Company \$5000, issued to them a certificate for that sum; and that the company have since received payment of part, and now hold the moneys so received, together with the certificate. The complainants pray for a discovery, that the moneys received may be decreed to be paid over, and the certificate to be delivered to them. The bill was filed by *Roulet* in his own name, by *L. F. Varet* as administrator of *Icard*, and by *W. Radcliff* as administrator of *Mumford*. To this bill the defendants demurred. The VICE CHANCELLOR overruled the demurrer, and his decision on appeal was affirmed by the CHANCELLOR. From the decree of the Chancellor the defendants appealed to this court. See the opinions delivered in the courts below, 7 *Paige*, 561, *et seq.*.

G. F. Talman, for the appellants, insisted upon the following points:

I. The commissioners appointed under the acts of congress, were authorized and required to examine all claims for indemnity, and to determine who were entitled to receive, and what amount. Their award upon the respective claims of the parties to this suit, fairly submitted, is final and conclusive. Their decision is the judgment or decree of a competent tribunal of exclusive jurisdiction. 2 *Russell*, 608. 4 *Simon*, 296.

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II. The claim of the respondents having been submitted to the commissioners, and rejected by them, their decision is final, and cannot be reviewed by any other tribunal. *Convention with France, Acts of 1st Sess. of 22d Cong. 1832, App. p. 34.* *Act to carry Convention into effect, id. ch. 199.* *4 Story's Laws, 2311.* *Treaty with Spain, 6 Laws of U. S. 622.* *Act to carry into effect Treaty with Spain, id. 579.* *3 Story's Laws, 1817.* *Reardon v. Hill, 2 Russ. 608.* *2 Sim. & Stu. 434.* *Loyd v. Trimbleston, 4 Simon, 296.* *Comegys v. Vasse, 1 Peters, 212.* *2 Swanst. 551.*

III. The award of the commissioners in favor of the appellants was correct and just. They had been damaged by the means mentioned in the treaty to the amount of five thousand dollars. No abandonment, cession or conveyance from the respondents was necessary. The actual payment [*508] of a loss of five thousand dollars was a sufficient support of their claim for indemnity to that amount. *Graeie v. N. Y. Ins. Co. 8 Johns. R. 245.* *Phillips on Ins. 464.*

IV. The award in favor of the appellants was for a loss which they had paid to the respondents; if the appellants were not entitled to it, the respondents have no right to recover it from them: the United States alone are entitled to reclaim it.

V. If the respondents were entitled, they had an adequate remedy at law. *Mitf. Pl. ch. 2, p. 123.* *Fonbl. Eq. b. 1, ch. 3, § 3.* *Law v. Thorndike, 20 Pick. 317.* *1 Johns. Ch. R. 463.* *4 id. 566.* *1 Peters' C. C. R. 363.* *1 McCord's Ch. Cas. 56.* *2 Leigh, 490.*

G. Wood, for the respondents, insisted upon the following points:

I. The effect of the award was to determine the amount to be allowed for the property lost by the illegal capture; but the rights of the respective claimants must be subject to examination by courts of law, like any other question of property. *Comegys v. Vasse, 1 Peters, 193.* *Delafield v. Colden, 1 Paige, 139.* The intervention of commissioners was for the sole object of determining what claims were *admissible* under the terms of the convention with France. The ordinary rules of evidence might have excluded many just claims, and a tribunal with large discretion was required for the benefit of the claimants themselves. But the same necessity did not exist for the determination of questions between parties claiming the same fund adversely. No power was given to them by law for such purpose. See the report of the commissioners accompanying the list of awards, and *Kane's notes of some of the questions decided by the commissioners p. 60 and 87.* They could not therefore decide upon conflicting private rights. Those must be decided by the ordinary tribunals possessed of the requisite powers for such purpose.

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II. Upon the facts stated in the bill, the respondents are entitled to the benefit of the award.

[*509] 1. *The claim to indemnity was based upon the loss of property.

2. The owner of the property captured, or the assignee of his right could alone make the claim.

3. The appellants were not the assignees of the right of the respondents. There was no assignment or cession, or abandonment and acceptance, which are the only modes of a legal transfer of the right of the assured. *Comegys v. Vasse*, 1 Peters, 193. Nor was there any equitable right; payment in full could alone create it. This was a compromise for one third of the amount for which the appellants were liable. The amount released was the price of the claim for indemnity against France, which therefore, by express agreement, vested in and belonged to the respondents.

After advisement, the following opinions were delivered:

By the PRESIDENT of the Senate. The main questions arising in this case are: 1. Is the award of the commissioners under the French treaty final and conclusive upon the rights of the parties litigant here? 2. If not, are the defendants in error entitled to recover from the plaintiffs in error the \$5000 received by the latter on the claim presented by them to the commissioners under the French treaty?

This case is, I think, upon both these points very clear.

1. Upon the first point, the vice chancellor was clearly right in saying, that "the awards of the commissioners are only to be considered as ascertaining what were proper claims upon the fund, the amount of the respective claims, and to whom, as between individuals and the government, the money might be legally paid; and not as settling the conflicting rights and equities of third persons, who may be interested, or entitled to participate in the money after the government had parted with it: these being matters more properly belonging to the ordinary tribunals of the country. This is the law of the case of *Comegys v. Vasse*, 1 Peters, 193, which arose under the Spanish treaty. See also *Sheppard and others v. Taylor and others*, 5 Peters, 675; *Manro v. Almeida*, 10 Wheaton, 473, and

[*510] *Willard v. Dorr*, 3 Mason, 164. To the same effect, also, is the case of *Delafield v. Colden*, decided in our own court of chancery. See 1 *Paige*, 139.

This is also in strict conformity with the view which the commissioners themselves under the Spanish treaty entertained of their own powers, and upon which they acted. See the final report made to the department of state of the United States on the 8th of June, 1824, by the commissioners

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under the Florida treaty, where, among other observations, they remark: “But in these and many other cases which occurred, the board having ascertained the full amount of the loss, distributed this amount so ascertained amongst the different parties claiming before them, and seeming to have right to receive it, (no matter in what character,) without deciding or believing itself possessed of the authority to decide upon the merits of the conflicting claims to the same subject. To whom of right the sum thus awarded when paid may belong; or for whom, how, or in what degree the receiver ought to be regarded as a trustee of the sum received, were questions depending upon the municipal laws of the different states of the union, the application of which to the facts existing in any case, the board did not feel itself authorized to make; and therefore abstained from instituting any inquiry as to the facts necessary to such a decision. These remarks the commissioners think it proper thus to state, lest their award may be considered as barring and finally settling pretensions, into which this board have, in truth, neither made nor believed itself authorized to make any examination whatever; but have purposely left it open for the adjudication of others, who will have better means of ascertaining the facts.”

The provisions of the *French treaty*, and the act of congress for carrying the same into effect, are not so essentially different from those of the *Spanish treaty*, as to distinguish the case now before this court, so far as regards this first point, from the case of *Comegys v. Vasse*, or as to render the principles of law, adopted in that case, inapplicable to the present. This point has been recently fully considered and decided by the supreme court of the United States, in *the case of *Trevall v. Bache*, 14 Peters' R. 95, in which Chief Justice Taney, who delivered the opinion of the court, says: “Upon the first question, (is the decision of the commissioners appointed under the treaty with France, conclusive upon the rights of the parties?) the court have entertained no doubt. This case cannot, we think, be distinguished from the cases of *Comegys v. Vasse* and *Sheppard and others v. Taylor and others*. It has been argued, on the part of the appellee, that these cases were decided under the treaty with Spain; and that the language of that treaty and of the act of congress creating the board of commissioners under it, differs materially from the treaty and act of congress under consideration, when defining the powers of the board. It is true that there is some difference in the words used; but, in our judgment, they mean the same thing. The rules by which the board is directed to govern itself in deciding the cases that come before it, and the manner in which it was constituted and organized, show the purpose for which it was created. It was established for the purpose of deciding what claims were entitled to share in the indemnity promised by the treaty; and they, of course, awarded the amount to such person as ap-

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peared, from the papers before them, to be the rightful claimant. But there is nothing in the frame of the law establishing this board, or in the manner of constituting and organizing it, that would lead us to infer that larger powers were intended to be given than those conferred upon the commissioners under the Spanish treaty. The plea therefore, put in by the defendant in bar of the complainants' bill cannot be sustained, and the case is fully open before this court upon its merits." It will be perceived that this is a decision directly in point. It has, therefore, I think, been clearly shown that the first point in this case has already been conclusively decided in the negative.

2. As to the *second point*, I think there can be as little doubt as upon the first.

The plaintiffs in error, insurers in this case, having refused to accept an abandonment of the cargo, after due notice of its seizure and [*512] condemnation by the French government, "under its decrees, and having refused, when required by the defendants in error, to pay as for a total loss; and having compromised the claim by a partial payment of only \$5000 instead of \$15,000, the amount insured, they thereby voluntarily renounced all interest in the cargo, and all participation in the *spes recuperandi* of the same; so that if the property itself, or either a full or partial indemnity therefor should, at any time thereafter, be recovered, it should be for the exclusive benefit of the assured, into whosoever hands the same might come or be; and the same would be the case whether such recovery were of the property itself specifically, or of an indemnity therefor. This point was expressly decided in the case above cited, of *Sheppard and others v. Taylor and others*, where it was said, "There is no difference between the case of a restitution in specie of the ship itself, and a restitution in value." The \$5000 received by the plaintiffs in error under the French treaty, being a portion of the indemnity for the cargo seized and sequestered in this case, the defendants in error are entitled thereto, and should be permitted to recover the same in this proceeding, as I have no doubt they might have done at law, in the equitable action of *assumpsit* for money had and received. The difficulties, however, attending this latter remedy, arising out of the peculiar condition of the parties in interest, at the time of filing their bill in equity, as suggested by the vice chancellor, were, with the other reasons given by him, quite sufficient to justify his entertaining the jurisdiction which he undoubtedly had of this case. His decree is, I think, in all respects right. The decree of the chancellor, therefore, affirming that of the vice chancellor, should be *affirmed*.

By *Chief Justice NELSON*. The appellants claim a reversal of the decree below on three grounds: 1. That the award of the commissioners un-

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der the French treaty is conclusive in favor of their right to the fund ; 2. That independently of the award, they are entitled to it upon the merits ; and 3. The remedy, if any, is at law.

The cases referred to by the chancellor, I think *decisive [*513] against their first position. The award is conclusive only, in respect to the validity of the claim for compensation under the treaty, and the amount. It did not necessarily involve a consideration of the equitable or legal rights of third persons to the fund—questions growing out of these rights are to be heard and determined in the ordinary course of judicial proceedings.

The title of conflicting claimants may have been, in some measure involved in the examinations of the commissioners preparatory to a distribution ; but this was only as between the individuals and the government with a view to ascertain the extent of the claims upon the fund, and the persons to whom it might be properly paid. Demands upon it arising out of the previous dealings of the original claimants were independent of the treaty or law of congress : they stood on the footing of contract express or implied between the individual parties, the final adjustment of which was not material to the proper execution of the duties of the commissioners. They had neither time for a careful investigation of such extraneous matters, nor was it practicable for the parties to furnish the requisite proof.

On the *second ground* it seems to me also plain the appellants fail to show any right. The bill charges that they had no interest in the cargo seized, as they rejected the abandonment when offered by the assured, and refused to pay for a total loss. They failed, therefore, to put themselves in their place, or to lay any foundation for claim to indemnity.

It is insisted, however, that the subsequent compromise between the parties in pursuance of which the appellants paid *one third* of the insurance money, (\$5000) had the effect to subrogate them, *pro tanto*, to the rights of the assured against the French government. The bill states that there was no abandonment, assignment, or cession of right to recover the subject insured, or any part thereof, or any demand for the same at the time of the compromise. We are bound to assume, therefore, that it was made without any stipulation for a corresponding interest in the claim upon the government—in the *spes recuperandi*—and that the *underwriters [*514] preferred paying the \$5000, and relinquishing the expectation of indemnity, to the payment of a total loss which was \$15,000, with the benefit of it ; or to state the other side of the arrangement—the assured released the insurance company from payment of the \$15,000 and assumed the hazard of the claim upon the French government in consideration of the payment of the \$5000. This I think the necessary conclusion from the facts stated in the bill and admitted by the demand.

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Although an action at law for money had and received might have been maintained by the surviving owner of the cargo against the company from the equitable nature of this remedy, as understood since the time of Lord Mansfield, it cannot I think, be doubted; the subject was also one of chancery jurisdiction. Simple trusts are now regarded at law, and the duty frequently enforced ; but it would be too much to say that this somewhat modern extension of the remedy at law had the effect to oust a court of equity of its original cognizance of the subject matter. There are many subjects of judicial investigation, over which the two courts have concurrent jurisdiction. This is one of them. Whether the arrangement is a wise one or not, must be left to the legislature. It is not to be presumed that the two tribunals, acting upon somewhat adverse principles, could settle the boundary without expensive, if not vexatious litigation.

Upon the whole I am of opinion the decree should be affirmed.

By Senator EDWARDS. It appears to me the chancellor and vice chancellor are right in the conclusions to which they have come, relative to the effect of the award of the commissioners upon the conflicting rights of parties as between each other. The duty of the commissioners is declared in the act providing for their appointment, viz. to receive and examine all claims which may be presented to them under the convention between the United States

and France, of the 4th of July, 1831, which are provided for by ['515] said convention according *to the provisions of the same, and the principles of justice, equity and the laws of nations. 1 Sess. 22 Cong. ch. 199, § 1. The object for which they were appointed appears to be to ascertain the number of claims of American citizens against the French government, which fell within the provisions of the treaty, and the amount of each claim, that a proper distribution of the twenty five millions of francs might be made amongst the claimants ; and as the money to be paid by the French government, was to liberate it completely from all the reclamations preferred against it by citizens of the United States, it was necessary that their awards should be final and conclusive between the claimants and the French government, to fulfil the conditions on which the money was to be paid, and the terms of the treaty. The amount, when paid by the French government, exonerated it from any further liability to those claims under the treaty ; and the due proportion of that amount paid to each individual in whose favor the commissioners made their award, discharged our government from any further liability, on account of the claims presented, and the principal object in naming the individual in the award, was to designate the person who might receive the money, and discharge the government from its trust. In negotiating the treaty, the government were but the agents of the individuals holding these claims, and received the money for their benefit.

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The claims being the property of individuals, were assignable, and who eventually would be legally entitled to the money the government could not know, unless it was empowered to call the parties and witnesses before some tribunal, and determine the question in a legal form.

But in what tribunal could the conflicting rights of these claimants be settled? The claimants are citizens of this state. Congress could not authorize commissioners to form such a tribunal, nor could they institute a new tribunal with sufficient powers to adjudicate the matter in controversy between these parties. By sec. 1, of the second article of the constitution, the judicial power of the United States shall be vested in one supreme court, and such inferior "courts as congress may from time to time ordain [*516] and establish. But the judicial power of these forums do not extend to controversies between citizens of the same state, except where they claim lands under grants of different states. See 2d article, Const. U. States. Congress therefore could not constitute a tribunal with exclusive jurisdiction over the rights of these parties. It is manifest therefore to my mind, that no tribunal has passed upon these claims, which had the power to render a judgment final and conclusive between the parties. Nothing short of an absolute agreement between the parties could constitute the commissioners arbitrators, so as to make their award final and conclusive, as to the conflicting claims of the parties. But it is not pretended any such agreement has been consummated between them. As I come to the conclusion therefore that the award is not final and conclusive between the parties in determining their rights; the next question is, what are the equities in the bill as admitted by the demurrer?

It is difficult to conceive from the statements in the bill how the insurance company could make out a claim before the commissioners that should entitle them to an award for the \$5000. True it is, the company had paid that sum, but under what circumstances? They had insured to the amount of \$15,000 on the cargo of the vessel, and in consequence of the loss of the cargo, the owners had a claim against them for that amount, and in order to buy off their liability and to free and discharge themselves from the payment of the \$15,000, in consequence of the loss, they agree to pay and do pay \$5000, without taking any interest whatever in the *spes recuperandi* of the property lost—and even refuse to hold such interest. It appears to me, therefore, they relinquish all claim whatever to the money, or any portion of it paid on account of the loss of the cargo. I am aware that an *abandonment* is not necessary to give the insured a right to receive the proceeds of claims arising from losses which have been paid. A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other "parties on account [*517] of the loss. 1 *Phillips on Ins.* 464. But it is on the principle

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that the insurer is considered as purchasing the property as far as he pays or is liable to pay for the loss. 1 *Phil. on Ins.* 465. And had the insurers in this case paid the amount they had agreed to pay by the terms of their policy, they would have been so considered, and entitled to their portion of the amount paid by the French government for the loss, whether the owners abandoned or not. But how could they retain the situation which their policy gave them as presumptive purchasers, without complying with the terms of the policy? Will it be said the owners had a right to consent to a modification, and still permit them to occupy the same standing in point of interest? Undoubtedly they had. But did they do so? The owner consented to relinquish the payment of \$15,000 for \$5,000, and offered to the insurers an abandonment of the cargo, which offer was declined on the part of the underwriters. How, therefore, could this negotiation which cancelled the policy, give the insurers any interest in the property? The law cannot imply an interest against the absolute refusal of the party to take such interest, nor can a court of equity help out such a claim.

The doctrine laid down in *Gracie v. N. Y. Ins. Co.* 8 *Johns. R.* 244, that the assured is never obliged to abandon, and if he does not, he is always entitled to recover to the extent of his loss, I consider entirely correct. But if the whole amount of loss is recovered by the assured and they have received a portion of the loss from the underwriters of a policy, without any relinquishment of the *spes recuperandi* by such underwriters, the portion of the amount of the loss thus received is received in trust for the underwriters. In *Randall v. Cochran*, 1 *Vesey, sen.* 98, the commissioners appointed to adjust the losses sustained by unjust captures, would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were satisfied for their loss by the insurers. The lord chancellor said he "was of the opinion that the plaintiffs had the plainest equity that could be. The

[*518] person originally sustaining the loss was the owner; but after satisfaction made to him the insurer. No doubt but from that

time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid." And on the same principle, if the insurance company have received the \$5000, which, as the bill states, was a part of the aggregate sum of \$50,940 awarded, for the whole loss on the cargo, after having refused to pay the amount of the policy and accept of an abandonment, I see no reason why they have not received the money without any legal or equitable claim whatever, and why they should not be considered as holding it in trust for the owners of the cargo, or their representatives.

It appears to me, this is one of those cases in which the insurance company cannot conscientiously hold the \$5000 received—having absolutely de-

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clined to pay the amount of their policy and accept of the abandonment; and if so, a court of equity may entertain jurisdiction. Mr. Justice *Story*, says: “One of the most common cases in which a court of equity acts upon the ground of implied trusts, *in invitum* is, where a party has received money which he cannot conscientiously hold from another party.” 2 *Story’s Eq.* 501. The receipt of money under such circumstances, in equity, raises an implied trust. 2 *Fonbl. Eq. Book 2, ch. 1, § 1, note b.* 2 *Story’s Eq.* 501, 502. It is true that courts of law in the action for money had and received, have now jurisdiction of most of this class of cases, and furnish an adequate remedy when sufficient facts can be proved without calling upon the defendant to disclose them. 2 *Story’s Eq.* 502 and *cases there cited.* In *Law v. Thorndike*, 20 *Pick. R.* 320, the bill which was filed under this same French treaty was dismissed, on the ground that the plaintiff had an ample remedy at law in an action for money had and received, if he was entitled to recover. That case, however, was put upon the ground, that it was unnecessary for the plaintiff to come into the court for a discovery of facts. The court say, “the plaintiff has no need to come into a court of equity for a discovery. The facts upon which the right is claimed are all susceptible of proof. The defendant standing in a representative character, cannot be presumed to be personally acquainted with any material facts within his own knowledge, requiring a discovery. But it is not so in the case under review. The appellants against whom the claim is made are the original parties, and the bill calls upon them to answer under oath the allegations in the bill for the purpose of affording the necessary evidence; and also calls upon them to discover the amount paid to them upon the certificate issued. It appears to me, under such circumstances, we are not at liberty to infer that the party could make the necessary proof to recover at law, in an action for money had and received, and on that ground to say the bill should have been dismissed. I am for affirming the decree of the chancellor in overruling the demurrer.

On the question being put, *Shall this decree be reversed?* All the members of the court present, who had heard the argument, answered in the negative. Whereupon the decree of the chancellor was AFFIRMED.

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Where in an indictment for *murder* the crime is charged to have been committed with a *pre-meditated design to effect the death of the person killed*, the premeditated design or *express malice* must be proved, or the prisoner cannot be convicted, although the act be also charged to have

* Decided 28th December, 1840.

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been done with *malice aforethought*; the description of the character of the crime, *viz.* its perpetration with a *premeditated design*, cannot be rejected as surplusage. Where a judge, in his charge on the trial of a criminal case, after alluding to the benefit of good character to the accused in a doubtful case, called the attention of the jury to the *absence of such proof* in the case before them, it was held that he had erred, and a new trial was granted. From both these propositions the CHANCELLOR dissented.*

THE prisoner was convicted in July, 1839, at the New-York oyer and terminer, of the murder of one Peter Fitzpatrick. The first count of the indictment charged, that the prisoner, on the 13th of February, 1839, with force and arms, &c. at the first ward of the city of New-York, in and upon Fitzpatrick, *feloniously, wilfully and of his malice aforethought*, and from a premeditated design to effect the death of Fitzpatrick, did make an assault; and with a certain knife, &c. in and upon the groin of Fitzpatrick, **521 feloniously, wilfully and of his malice aforethought and from a premeditated design to effect his death*, did strike and thrust, &c. thereby giving him a mortal wound, of which he instantly died. The indictment contained a second count charging that the prisoner on, &c. at, &c. feloniously, wilfully and of his malice aforethought, and by an act imminently dangerous to him the said Peter Fitzpatrick, and evincing in

* The above propositions the reporter considers as settled by the decision of the court of errors. Beside which it was held:

By the CHANCELLOR and Senators, DIXON, EDWARDS, FURMAN and VERPLANCK, that the second associate judge of the common pleas of New-York may preside in the court of oyer and terminer of that city and county, *in the absence of a judge of the supreme court, a circuit judge or the first judge of the county*, but cannot act *conjointly* with either of those officers. Senator WAGER holds that he has no power under any circumstances to preside in that court.

So it was held by the CHANCELLOR, and Senators DIXON, EDWARDS, FURMAN, ROOT, VERPLANCK, and WAGER, that the *aldermen* of the city and county of New-York may preside in the court of oyer and terminer of that city and county: at all events, that their *power* to do so cannot be collaterally inquired into.

So it was held by the CHANCELLOR, and Senators EDWARDS, VERPLANCK, and WAGER, that a *memorandum in pencil*, purporting to be the examination of a witness taken on an *ante mortem* inquisition by a coroner, was *in itself* inadmissible in evidence for the purpose of impeaching a witness, or as not being duly authenticated. From this opinion Senator FURMAN dissents.

So it was held by the CHANCELLOR and Senator VERPLANCK, that the retiring from the bench by a judge after the commencement and before the termination of a trial, will not affect the validity of the trial, provided a *quorum* competent to proceed in the trial be left. From this opinion Senator FURMAN dissents.

How far the acts of the judges *de facto* will be sustained, discussed by the CHANCELLOR, Mr. Justice BRONSON, and Senators DIXON, FURMAN, ROOT and VERPLANCK; and the right of a *party affected* to raise on writ of error an objection to the due organization of a court, discussed by the CHANCELLOR and Senator VERPLANCK.

The CHANCELLOR holds in this case, that the court for the correction of errors will listen to an objection *appearing on the record*, although not urged in the supreme court, if it be of such a character that had it been presented there it could not have been obviated by the opposite party

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him the said Ezra White a depraved mind regardless of human life, did make another assault, and with a certain knife, &c. in and upon the right groin of him the said Peter Fitzpatrick, with a *depraved mind regardless of human life*, feloniously, wilfully and of his malice aforethought did strike, stab and thrust, &c.

At the trial, the counsel for the prisoner took a bill of exceptions, in which it was stated that the cause came on for trial at a court of oyer and terminer, held in and for the city and county of New-York, on the 10th July, 1839, before the Hon. Ogden Edwards, circuit judge for the first circuit, William Inglis, one of the associate judges of the court of common pleas for the city and county of New-York, appointed under and by virtue of the act of 1st April, 1839, entitled "an act to repeal the seventh section of the act relating to the court of common pleas for the city, &c.

and to authorize the appointment of an additional judge;" *and [*522] Egbert Benson and Elijah F. Purdy, aldermen, &c. Under this organization, Judge Edwards presiding, a jury was empanelled, a tales directed, challenges decided, witnesses examined, and the opinion of the court pronounced by Judge Edwards on several questions that had arisen as to the admissibility or rejection of testimony, without any intimation that he intended to abandon the *bench* during the progress of the trial; he then withdrew and continued absent during the remainder of the trial. Judge Inglis and the two aldermen remained, and they presiding, the trial was continued. The indictment against the prisoner was found at the New-York general sessions, in which the *recorder* and two of the *aldermen* of the city presided.

William H. Wright, a witness for the people, testified that he knew White; that he, the witness, was at the house of one Lawrence Gaffney (where there was a house-warming) several times in the course of the night in which the homicide was committed; and gave evidence tending materially to fix the offence upon the prisoner. Wright had been examined before the police, and his deposition taken there was read in evidence by the counsel for the prisoner. He there stated that he did not know White's name at the time; but now knew it. He was now cross-examined as to his deposition before the police, and said: "I did not express any doubt about who did the act. I did not then recollect his name." He admitted that he had been examined before the coroner, on the occasion of the ante-mortem inquest on Edward Dennon, who, as it now appeared, was wounded by the prisoner in the same affray. The inquest was taken February 13th, and was admitted by the district attorney, to have been duly filed by the coroner. There was an endorsement on it in pencil in these words: "Witnesses. Wm. H. Wright. Is a watchman. About 3 o'clock this morning, came along, &c. and found they were quarrelling, &c. and told the young men to go away. One of them came up and jerked the door open, and saw him make a motion to

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stab ; and from the action of his arm have no doubt he did stab him, &c. Soon after saw him make another stab at another man, and he [*523] fell. The first man did not fall. "Did not see but one man use any instrument. *Edward Dennon* was one of the party, &c. was stabbed, and did not know by whom, &c. Doctor *Charles Fitzpatrick* says he was called to this house about 3 o'clock ; found the wounded man *Dennon*, &c."

The inquisition and the endorsement thereon were offered in evidence for the purpose of contradicting Wright's testimony on this trial. The district attorney objected to the reading of the endorsement, on the ground that it should first be proved that the testimony was reduced to writing from the witness' statement. That it was evidently, on its face, an imperfect statement ; and not a part of the inquisition. That it had no *official signature*, or *authentication*, and might be a mere private memorandam of the coroner, or of some other person made for his own use. The court decided that the inquisition was admissible, but excluded the statement endorsed thereon. The prisoner's counsel excepted.

Judge Inglis charged the jury that the terms *premeditated design*, as used in the statute and in the *first count* of the indictment, were tantamount to and conveyed the expression of the same idea as the words *malice aforethought*, used at common law, and found in this count ; that if the first count was to be regarded as framed under the statute, the words *malice aforethought*, might be regarded as *surplusage* ; that if viewed as a count at common law, it was sufficient, and the addition of the words *premeditated design*, did not affect its validity ; and the first count was sufficient to comprehend *any of the grades or classes of murder* embraced in the first and second subdivisions of the fifth section of the title of the statute treating of crimes punishable with death. 2 R. S. 657. And that if the jury should be of opinion that the killing of the deceased took place either from *premeditated design to effect the death of the person killed, or any human being*, or that it was perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any

[*524] premeditated design to effect the death of any particular individual, the crime fell within the common law definition of *malice aforethought*, and that if the facts so warranted, it would be their duty under the first count of the indictment to convict the prisoner. He further instructed them that it was not necessary that *express malice*, or a *premeditated design* to take the life of the deceased or of any other human being, should be proved : that the jury might draw the inference of the existence of such malice or premeditated design from the facts accompanying the killing, however suddenly the act might have been committed. He instructed them to exclude from their consideration the *second count* of the in-

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dictment, because it was not alleged therein that the killing was perpetrated by an act imminently dangerous to other persons as well as the deceased. He further charged the jury, "that in all doubtful cases, where the scales of justice are nicely poised, the evidence of a good character and a virtuous life, had great weight in turning the balance in favor of the prisoner; and in this case there was an absence of such testimony on the side of the prisoner." The jury found the prisoner guilty. The counsel for the prisoner having taken various exceptions to the decisions of the court and the charge of the judge, and procured a bill of exceptions to be signed, the sentence of the law was suspended and the proceedings were removed into the supreme court by *certiorari*, to obtain the advice of the court. The case was argued in that court, and the court ordered the record to be remitted with directions that sentence be passed on the prisoner. *See 22 Wendell, 167, et seq.*

Sentence was accordingly passed by the oyer and terminer, but a *writ of error* having been sued out by the prisoner, his execution was respite by the governor from time to time until the judgment of this court was pronounced. When the case was before the court in 22 *Wendell*, 167, it was there by *certiorari*, and to enable the prisoner to carry it up to this court, a *writ of error* was sued out removing the record from the oyer and terminer into the supreme court. In the record thus removed were inserted the facts suggested as necessary, in 22 *Wendell*, 174, to present the question arising on the retiring of the circuit judge from the bench. The cause [*525] was argued in the supreme court on the record being brought in, by

D. Graham, jun., for the prisoner.

J. R. Whiting, (district attorney) for the people.

After advisement, the following opinion was delivered :

By the Court, BRONSON, J. The questions arising on the bill of exceptions were considered when this case was before us on a former occasion. 22 *Wendell*, 167. Those points are now only made *pro forma*, and we have nothing to add in relation to them.

The only question mentioned on the argument, was one in relation to the organization of the courts before which the prisoner was indicted and tried. It is insisted on his behalf that the aldermen of the city of New-York could not rightfully sit in those courts. It is not denied that the aldermen have been declared, by law, judges of the criminal courts of the city and county of New-York; but it is said, that the acts of the legislature conferring this authority, are repugnant to the constitution, and therefore void. That ques-

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tion we have just considered in the case of *The People v. Varian and others*; and we do not think it necessary to add any thing to what has already been said. We entertain no doubt that the statutes in question are valid, and that the aldermen were fully authorized to sit in the courts of general sessions and oyer and terminer, where the indictment was found and tried.

II. But if we are mistaken in saying that the statutes are valid, there is another principle which must control this case. If the aldermen were not judges *de jure*, they were, at the least, judges *de facto*, with color of legal title; and no principle is better settled than that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done. It would be impossible to maintain the supremacy of the laws, if individuals were at liberty, in this collateral manner, to question the authority of those who, in fact, hold public offices under color of legal title. Where there is a plain usurpation of an office without any show of title, the acts of the intruder will undoubtedly be void, both in relation to individuals and the public. But where there is color of lawful title, the officer must be obeyed and his acts respected, until judgment of ouster is pronounced against him in the proper proceeding for that purpose. The government may try the right by *quo warranto*; and the title of the officer may also be questioned where he is a party, and is sued for an act done which he can only justify as an officer. *Fowler v. Beebe*, 9 Mass. R. 231. But this is a case where officers having apparent authority to do the act, have rendered judgment between the people and the prisoner, and neither party can, in this collateral way, call in question the title of the judges. If there had been judgment of acquittal, it would have concluded the people, and the prisoner could not have been further prosecuted.

To hold that the acts of such officers as I have mentioned are not binding, as between third persons, would lead to the most serious consequences. No man would be safe in taking a title until he had examined the commission of the judge or other public officer who had done any act upon which the validity of the title depended, and had then gone from the commission up to the source from which the officer derived his authority. We have recently rendered judgment of ouster against a county clerk—*The People v. Vail*, 20 Wendell, 12—and yet it cannot admit of a doubt, that the acts which he did while in under colour of election, such as the recording of deeds, administering oaths, entering verdicts, and the like, are just as valid as they would have been had the judgment been the other way. Still more recently, we have pronounced judgment of ouster against a police justice of the city of Albany, *The People v. Kane*, 23 Wendell, 414; but those who executed his mandates while he held under the forms of law, are as perfectly protect-

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ed as though there had been no defect in his title ; and his orders and judgments, so far as they operate between other parties, are as valid and effectual as though "he had been an officer *de jure*. These [*527] cases are only mentioned by way of example. The rule is universal.

It was suggested at the bar that the rule did not apply in the case of a person exercising a *judicial* office ; but no case to that effect was mentioned, and it would be strange if one could be found. The question has, no doubt, most commonly arisen in relation to ministerial officers, but, on looking into several of the cases, I find no such distinction as that which the counsel supposes should exist. In *The King v. Lisle, Andrews*, 168, it was said, that the rule comprehended both "judicial and ministerial acts;" and in *McIntstry v. Tanner*, 9 Johns. R. 135, it was objected on a *certiorari* to reverse a judgment, that the justice who rendered it was constitutionally disqualified to hold the office ; and it was answered that had the objection been well founded in point of fact, "it might well be questioned whether the court could take notice of such an objection, in this way, since we are to intend that the justice acted under a regular commission ; and he has not been put to answer for an unconstitutional exercise of power." Now, here the commission of the aldermen is written in the statute book, and surely no one can question their title on a writ of error. It must be tried in another form. See also *Viner's Abr. Officer and Offices*, (G. 4,) and *Harris v. Jays, Cro. Eliz.* 699, where it is said, that the law favors acts of one in a reputed authority." In *Bucknam v. Ruggles*, 15 Mass. R. 180, the court said the rule extended to *all* public officers, and that they could discern no reason for restraining it ; and in *Wilcox v. Smith*, 5 Wendell, 281, it was applied in the case of a judicial officer. It would be strange, indeed, if the judgment or decree of a court of competent jurisdiction could be impeached on the ground that a flaw had been discovered in the commission of the judge.

We are of opinion, upon both grounds, that the objection taken by the prisoner's counsel to the title of aldermen cannot prevail. Judgment affirmed.

The case was thereupon removed into the court for the correction of errors, where it was argued by

*D. Graham, jun. & S. Stevens, for the prisoner.

[*528]

J. R. Whiting, (district attorney) and Willis Hall, (attorney general,) for the people.

After advisement the following opinions were delivered :

By the CHANCELLOR. Several questions were raised in the supreme
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court, and have also been discussed in this court upon the writ of error; some of which relate to the organization of the court and the jurisdiction of the officers before whom the trial was had, and others to the legality of the decisions made in the progress of the trial. This last class of questions I shall first proceed to consider.

The first of this class is as to the right of the court to proceed with the trial after one of the judges, who was present at the commencement of such trial, had left the bench; admitting that the remaining judges would have been legally competent to hold a court of oyer and terminer and to try the offence, if the trial had commenced before them alone. Upon this point I have no doubt; for the revised statutes expressly provide, that each justice of the supreme court and each of the circuit judges shall have power to hold any circuit court, and to preside in any court of oyer and terminer in this state, either for the whole time for which such court shall continue, or for any part of that time. 2 R. S. 203, § 14. There would indeed be an impropriety, where there was but one judge present who was competent to preside, in permitting him, unless in a case of absolute necessity, to leave the bench after the jury had been empanelled and a part of the testimony given, and allowing a new judge who had not been present during that part of the trial, to take his place, before the cause had been finally committed to the jury for their decision. It is not to be presumed, however, that any judge would so far forget his duty as to leave the bench, under such circumstances, except in a case of sickness or other imperious necessity; and this court, upon a writ of error, would not be justified in presuming he did so, especially in a trial involving the life [*529] of a prisoner, unless the fact distinctly appeared upon the record. But even should such a case occur, or if by the sickness or death of the presiding judge during the trial, it should become necessary to substitute a new one in his place who had not before been present, I see no principle of law which would require the empanelling of a new jury; though it would undoubtedly be proper to re-examine the witnesses before such substituted judge, unless the parties would consent that he should take a statement of the evidence, and of the previous proceedings upon the trial, from the notes of the former presiding judge, or from his associates on the bench. This, however, is not a case of that kind, provided the trial was properly commenced before the four judicial officers who were present at the commencement of the trial, and if the last three were competent to hold a court of oyer and terminer without the presence of the circuit judge; for in that case there was no necessity of commencing the trial *de novo*, as all the remaining judges had been present from the commencement of the trial, and knew what had taken place as well as the judge who had left the bench, for some good reason as we must presume. I believe, it is no uncommon thing in all courts, in criminal proceedings as well

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as in civil suits, where at the commencement of the trial there are more judges on the bench than the law requires to form a quorum, for some of those judges to leave the bench and for the others to proceed with the trial, provided the judges who remain are legally competent to hold the court. And certainly if the chief justice and one of the associate justices of the supreme court, together with two other judges authorized to sit with them or either of them in the court of oyer and terminer in the city of New-York, were upon the bench of that court at the commencement of a trial, there would be no impropriety in continuing the proceedings before the three remaining judges, provided a case of sickness, or his official duties elsewhere, rendered it necessary or expedient that the chief justice should leave the court before the conclusion of the trial. In this court, and even in the present case, some of its members who were here at the commencement of the argument, left the court before the argument was concluded; and [*530] yet no one can doubt as to the right of the other members, who remained and heard the whole argument and constituted a constitutional quorum to decide the cause. The case would also have been the same if the presiding officer of this court had been compelled to leave his seat upon the bench before the conclusion of the argument.

I think the judges, before whom the prisoner was tried, were right in excluding the *memorandum in pencil*, on the back of the inquisition, as legal evidence of what the witness, Wright, testified, or rather of what he was supposed not to have testified, before the coroner on the *ante mortem* inquest held upon the body of the wounded Dennon. This court has, I admit, decided that a note or *memorandum in writing* of a sale of personal property, under the statute of frauds, was sufficient if written in pencil; and that it was not necessary that it should be written with ink or any other durable substance or liquid. *Clason v. Bailey*, 14 Johns. R. 484. I apprehend that case, however, was decided in reference to the particular phraseology of the section of the statute under which the question arose, which used the words, *note or memorandum of the agreement;*" and that it was not intended to lay down a general principle that where a statute required a judicial proceeding, or a will, or a declaration of trust, &c. to be in writing, it would be a sufficient compliance with the statute, if the record or other legal instrument was drawn up and authenticated with a lead pencil merely. Indeed, the late Chancellor Kent, who delivered the opinion of this court in that case, puts the decision upon the words *note or memorandum* there used. He says "the statute of frauds, in respect to such contracts as the one before us, did not require any formal and solemn instrument. It only required a *note or memorandum*, which imports an informal writing done on the spot, in the moment, and hurry, and tumult of commercial business. A lead pencil is generally the most accessible and convenient instrument of writing on

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such occasions, and I see no good reason why we should wish to [*531] put an interdict on all *memoranda* written with a pencil. I am persuaded it would be attended with much inconvenience and afford more opportunities and temptation to parties to break faith with each other than by allowing the writing with a pencil to stand." The court of king's bench in England, in a more recent case, has also decided that an endorsement of a promissory note written with a pencil was a valid endorsement, within the custom of merchants, at common law. *Geary v. Physic*, 5 Barn. & Cress. R. 234. There is certainly great danger in leaving the evidence of a contract to depend upon a mere pencil memorandum ; as the contract is frequently drawn in such a manner that by rubbing out a single word, the agreement might be entirely different from that which was made by the parties thereto ; and yet if an entire clause thus obliterated happened to have been at the commencement of the agreement, the fraud might be perpetrated without the power of detection. But if parties are so unwise as to make their agreements in that way, I do not know that it is the business of courts in all cases to endeavor to protect them against the probable consequences of their folly, by requiring such commercial contracts to be written with more enduring materials. I do not, therefore, feel disposed to find fault with the decision of this court so far as the principle involved therein is confined to the class of cases which was contemplated by the court, when that decision was made. The general interests of society, however, require that the principle should not be extended to deeds and wills, and other solemn instruments ; although these are also the acts of the parties whose rights or testamentary wishes alone would be affected by an obliteration, whether intentional or accidental, of a part of the instrument. And certainly the principle can never, with any propriety, be applied to the official acts of public officers, or of courts, whose proceedings are required to be in writing, either by statute or according to the requisitions of the common law. They are not to be permitted to jeopard the rights of individuals, or the interests of the public, by departing from the practice which has been pursued for centuries ; not only of writing their official acts and proceedings [*582] "but upon some enduring material, as paper or parchment, also with materials which will be likely to last. I believe the uniform practice has been, since the beginning of the reign of Richard the first, when the first regular series of records in England commences, to write every thing which was to be placed on record in that manner. And certainly no reason can exist for departing from that practice at the present day, when the ordinary writing materials have become so common that they are or at least ought to be in the house if not in the pocket of every one who is authorized to draw legal instruments, or to transact any official business. In this case it would have been just as easy for the coroner to have drawn up

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and certified the depositions of the witnesses with a pen and ink as it was to draw up and sign the inquisition itself in that manner. The statute requires the testimony of all witnesses examined before the coroner's jury to be reduced to writing by the coroner, and to be returned to the next court, with the inquisition ; and when so returned the legislature evidently intended that such examinations should become a part of the public records of the county for the purposes of future reference. The meaning of the law, therefore, was that the depositions of the witnesses should be reduced to writing in the ordinary manner in which legal proceedings are reduced to writing when they are to be preserved as matters of record. And the writing them down in pencil was no more a compliance with the statute than if the coroner had written them with chalk upon a board and deposited that in the clerk's office, with the inquisition.

Again ; the memorandum in pencil was not signed by the coroner, and there was nothing upon the paper to show that these were the depositions of witnesses sworn and examined before the jury upon the taking of the inquisition, or that they were in his hand-writing. It was not intended that the depositions of witnesses and the recognizances should form a part of the inquisition itself ; but only that the coroner should return them with, or at the same time when he returned the inquisition. He had an undoubted right to place the written examinations of the witnesses "on" ['538] the back of the inquisition, or to annex them to the same ; but still he should have certified that they were the depositions of the witnesses examined before the jury upon the taking of that inquisition. If he had done so, and signed his name to the same, the court might probably have presumed that the witnesses were sworn.

The statute does not make these examinations before the coroner *evidence*, either for or against the party charged with having killed or wounded the person upon whose body the inquisition is held. But if any witness thus examined is called and sworn as a witness in any other suit or proceeding, it is undoubtedly competent for the party against whom he is called to give his former examination in evidence to impeach his testimony, by showing that he gave a different account of the transaction when sworn upon the coroner's inquest. It was with that view, as I understand the case, that the examination of Wright, upon the inquisition held upon the body of Dennon, who was wounded, but not killed, in the same affray, was offered in evidence here. The prisoner, however, had lost no legal right by the neglect of the coroner to take down and certify the examinations of the witnesses on that inquisition, according to the statute ; for as that had not been done, it was perfectly competent for the prisoner to call the coroner, or any other person who was present at the taking of the deposition, for the purpose of proving

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that Wright gave a different account of the affray then, from what he did on the trial, if such was the fact.

The next objection relates to the form of the indictment and the supposed error of the presiding judge, in telling the jury that they were authorized to find the prisoner guilty under the first count of the indictment, if they believed him guilty of murder, either from a premeditated design to effect the death of the person killed or of any human being, or by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, as in either case the crime fell within the common law definition of killing with malice aforethought. The correctness of this part of the [*584] charge depends upon the question whether the first count ^{*}of the indictment was a good indictment for murder at the common law, so as to authorize a conviction under it if the jury believe the prisoner guilty of the crime of murder, as defined either in the first or second subdivision of the fifth section of the title of the revised statutes relative to crimes punishable with death. 2 R. S. 657.

Why the presiding judge should have told the jury to exclude the second count of the indictment entirely from their consideration, I cannot understand; for if he was right in supposing that the first count was good as a common law count for murder with *malice aforethought*, notwithstanding the insertion therein of the additional words, *and from a premeditated design to effect the death of him the said Peter Fitzpatrick*, the second count was equally good as a common law indictment for murder, although it contained the additional words, *and by an act imminently dangerous to the said Fitzpatrick, and evincing a depraved mind regardless of human life*. The prisoner, therefore, if guilty of murder, might have been found guilty under the second count as well as the first. The result of the conviction being the same also in every respect, whether he was found guilty under both counts or under one of them only, there was no reason for telling the jury to confine themselves to either count particularly, as they would be authorized to find a general verdict. The error in this respect, which was an error in favor of the prisoner rather than to his prejudice, probably arose from another mistake in this part of the charge, which was also in favor of the prisoner, in telling the jury that the legal construction of the second subdivision of the section defining the crime of murder was, that the killing must be perpetrated by an act imminently dangerous to *other persons* as well as to the one killed. In this construction of the second subdivision, the presiding judge was clearly wrong. The word *others*, there means others than the persons by whom the act of killing is perpetrated. Although the plural, *others*, is there used, it is not necessary that the act should be imminently dangerous to more than a single individual, and that individual may be the

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person killed, as was charged in the second count of this indictment ; for wherever a plural word is thus used, "the eleventh section of the act concerning the revised statutes declares it shall be deemed to include the singular also, and *vice versa*, unless it be otherwise specially provided, or unless there is something in the subject or context repugnant to such construction. 2 R. S. 778. The true construction of the second subdivision, therefore, is the same as if it was written thus : "When perpetrated by an act, or by several acts imminently dangerous to others, or to another than the person or persons perpetrating such act or acts ; and evincing a depraved mind or depraved minds," &c.

Admitting, then, that the counsel for the prisoner were right in supposing that the additional words in these two counts of the indictment restricted the first count to a killing with *a premeditated design*, as defined in the first subdivision, and the second count to killing by *an act imminently dangerous to others*, &c. as defined in the second subdivision, the prisoner could not have been injured by this part of the charge, although the jurors were in effect told that if they believed him guilty of the offence charged in the second count of the indictment, they should not find a verdict against him on that count, but on the first only. The jury being judges both of the law and the fact, and having come to the conclusion that the defendant was guilty of the murder as charged, either in the one or the other of these counts, or in both, have applied the law and the facts of the case to the two counts of the indictment better than the judge did in his charge ; and have found a general verdict upon both counts against the prisoner. And I do not see that this court has any legal power to reverse the judgment if the verdict was right as to the second count, even if we should be of the opinion that the judge ought to have told the jury that the prisoner could not be legally convicted under the first count of the indictment, unless they were satisfied from the evidence that there was a premeditated design on his part to take the life of the person killed.

I have also arrived at the conclusion that the supreme court was right in supposing that this was a good common law indictment for murder, with malice aforethought ; and that the additional allegation in each count may be rejected "as surplusage. The cases in which the addition [*536] of an allegation not required by law to be stated in the indictment renders it necessary to prove such allegation, are those in which the allegation identifies the offence charged ; and where, if the prisoner was acquitted in consequence of that misdescription of the offence, he could be again indicted and tried for the offence intended to be charged in the first indictment. Thus, in the case of *The Queen v. Dean and another*, as found in 4 *London Jurist*, 364 the prisoners were indicted for a conspiracy in procuring certain affidavits to be filed in the court of chancery to obtain money

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from that court improperly. Upon the common law principles of indictments for conspiracy, as settled in England, it probably would have been sufficient to have charged in general terms that there were certain moneys in the court, without specifying who was the owner thereof, and that the prisoners conspired together to deceive the court, and pervert the course of justice, by filing false affidavits, to show the money belonged to a person who was not in truth entitled to it, and that they procured the false affidavits to be filed for that purpose ; and then to have given the facts in evidence to support this general allegation upon the trial of the indictment. But in that case, instead of doing so, the prosecutor stated in the indictment, after setting out a certain will, that there were moneys in the court of chancery to which *L. Gompertz* had become entitled under that will, and that the defendants procured the false affidavits to be filed for the purpose of getting those moneys, with intent to defraud *Gompertz* ; with the additional allegation that they intended to deceive the court of chancery and pervert the course of justice. Upon the trial, it appearing that the money which the defendants were seeking to obtain, was not the money of *Gompertz*, as alleged in the indictment, the court held that the allegation that the affidavits were filed to obtain money belonging to *Gompertz*, and to defraud him, went to the identity of the offence and was not mere surplusage.

It is also a general rule in indictments, that every fact or circumstance which is a necessary ingredient to constitute the offence, or which is material to its identity, must be correctly set out, and must be proved [*537] substantially as charged ; "but that any fact or circumstance . which is not a necessary ingredient in the offence, and which is not material to its identity, if set out in the indictment may be rejected as surplusage on the trial. Thus, in the *King v. Jones*, 2 Barn. & Adol. 611, in an indictment against a surgeon for giving a certificate relative to an insane person, without having visited and personally examined the individual to whom it related, contrary to the statute, the indictment charged that the defendant, *knowingly*, and *with intent to deceive*, signed the certificate set forth in the indictment without having visited and personally examined the individual to whom it related ; the court held that the allegation that the certificate was signed *with the intent charged* in the indictment, was mere surplusage, and must be rejected. Judgment was therefore given against the defendant, although the jury negatived any such intent. See the *United States v. Howard*, 3 Sumner's R. 12. So in the ordinary case of burglary, where the indictment charges that the prisoner broke and entered the dwelling house with intention to steal, and did then and there steal certain goods, &c. being in such house, the allegation of the additional circumstance of stealing the goods may be rejected as surplusage, if the jury are satisfied that the prisoner intended to steal ; although if the fact of stealing had been

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proved it would of itself have furnished conclusive evidence of the prisoner's intent. But if this allegation was not proved, other evidence might be produced to prove his intention to steal. So also, in the case under consideration, the indictment having charged the murder to have been committed with *malice aforethought*, which embraced every definition of murder, it authorized the conviction of the prisoner upon that count, upon proof bringing the case within either of the statutory definitions of murder with malice aforethought. The public prosecutor, therefore, was not precluded from giving such evidence, although the indictment stated one other circumstance, which, if proved, would have itself established the allegation that the killing of the deceased was with malice aforethought, in the legal sense in which that expression was used in the indictment.

"I see nothing exceptionable in the remark of the judge that [*588] there was an absence of any testimony on the part of the prisoner of former good character. It was the mere statement of a fact in the case which almost necessarily followed the correct legal position which the judge had just laid down : that in doubtful cases, when the scales of justice are nicely poised, evidence of a good character and of a virtuous life has great weight in turning the balance in favor of the prisoner. The meaning of this part of the charge is not that where the probabilities of the prisoner's guilt or innocence are equal, testimony of character is of importance ; but when the scales of justice are nicely poised, that is, when the minds of the jury are nearly balanced upon the question whether the testimony against the prisoner is not too strong to admit of a reasonable doubt of his guilt, then evidence on his part that he has up to the period of the alleged crime, sustained a character which is wholly inconsistent with what is then charged against him, is entitled to great weight in turning the balance in his favor, by creating a doubt in the minds of the jury whether he has thus suddenly departed from that blameless course of life which he had previously pursued. The remark too was properly made in reference to the evidence in this case. The testimony showed that the life of a citizen had been taken, under circumstances of great aggravation, by some one of the lawless associates who had so improperly intruded themselves into the house where the deceased and his friends were assembled, and that the prisoner was probably the one who committed the murder. In summing up a cause to the jury, even in a capital case the judge has no right to point out to the jurors the strong points in the prisoner's defence only, and the weak points in the case made by the people. It is his duty to hold the scales of justice equally balanced between the people and the prisoner ; and to point out to the jury impartially the strong and the weak points in the case of each, whether arising from the evidence given, or from the want of evidence which might have been given by either, if any such evidence existed. The bill of exceptions does not profess to contain

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[*539] the whole *charge, but only such points of it as the prisoner's counsel deemed objectionable. We have no right, therefore, to presume that the presiding judge, in a capital case, so far neglected his duty as to omit to tell the jury, what is usual in every criminal case which can admit of any doubt, that if they had any reasonable doubt as to the guilt of the prisoner, it was their duty to acquit.

The objections to the organization of the court at the commencement of the trial, and to the jurisdiction and authority of all or any of the officers before whom the trial was subsequently proceeded in, to hold or sit in a court of oyer and terminer, I will now proceed to consider. The objection that *aldermen*, who are elective officers, and not appointed by the governor and senate, cannot be constitutionally authorized by the legislature to exercise judicial powers, as the *ex officio* judges of any court, I have fully considered in another case, upon the information filed by the attorney general against the present mayor and aldermen of the city of New-York, and have arrived at the conclusion that the objection is untenable. But as other members of the court may differ with me in opinion on that question, it may be proper that I should express an opinion as to the legal effect of such a construction of the constitution as is contended for by the counsel for the plaintiff in error in the present case.

Upon a full examination of the question, I am satisfied that the principle, that the official acts of officers *de facto* are valid as between third persons, cannot properly be applied to an unconstitutional exercise of power by an officer *de jure*, who claims to exercise that power by virtue of such office. An officer *de facto* is one who comes into a legal and constitutional office by *color* of a legal appointment or election to that office ; and as the duties of the office must be discharged by some one, for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed, before they submit themselves to his authority, or call upon him to perform official acts which it is necessary should be performed. Thus, for instance, the [*540] constitution *requires that the justices of the supreme court shall be appointed by the governor, with the advice and consent of the senate ; but if, either intentionally or from inadvertence, the governor should appoint and commission an individual as one of the justices of that court, without having previously nominated him to the senate and obtained the consent of that body, and the person thus appointed should take upon himself the duties of that office, he would be a judge of the supreme court *de facto* ; although upon a *quo warranto* he might be removed from the office to which he had not been legally and constitutionally appointed ; and his official acts while he was such judge *de facto*, would be valid as to third persons ; so that this court, upon a writ of error brought for the purpose of reversing

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a judgment pronounced by him, as such judge *de facto* of that court, would not be authorized to enquire as to the validity of his appointment. The result would be the same where his appointment had been made with the consent of the senate, in case he was constitutionally *ineligible* in consequence of his being a minister of the gospel. Should the executive or the legislature, however, either by a public statute or otherwise, assign the duties of judges of the supreme court to the several *clergymen* of a city for the time being, or attempt to authorize them, by virtue of their clerical offices, to be judges and to hold the supreme court, in violation of the constitution, such clergymen would not be judges of that court *de facto*, so as to make their judgments valid or binding upon the parties thereto. On the contrary, the holding of the court by such clergymen would be the exercise of an illegal and unconstitutional power; and if it appeared upon the face of the record that the court was held before them as clergymen of such city, as it appears in the present case that the court of oyer and terminer was held before *Benson* and *Purdy* in their characters of *aldermen* merely, the judgment would be clearly erroneous, if not absolutely void. This distinction between the acts of an officer *de facto* exercising the powers which legally and constitutionally belong to the office into which he has obtruded himself, and the acts of an officer *de jure* which he cannot legally or constitutionally exercise "by virtue of the office he rightfully holds, will be [*541] seen to a certain extent in the cases of *McInsty v. Tanner*, 9 *Johns. R.* 134, and of *Clayton v. Per Dun*, 13 *id.* 218, in our own supreme court. In the first case, the justice of the peace was an officer *de facto*, and by virtue of that office had power to hold the court before which the cause was tried; although he was not rightfully appointed to the office, because as a *minister of the gospel* he was constitutionally ineligible. There the supreme court held the judgment valid as between the parties thereto, and that it could not be reversed on a certiorari. In the second case the justice was legally and rightfully appointed to the office, and was therefore an officer *de jure*, but had not the legal right to exercise the judicial power which he assumed to exercise by virtue of that office, because he kept a *tavern*; and there the supreme court reversed the judgment, although the justice claimed and exercised the power of holding a court and trying the suit commenced before him by virtue of his office. So in the case under consideration, if the *aldermen*, as elective officers, were *constitutionally incompetent* to hold a court of cyer and terminer in conjunction with the circuit judge, or the first judge of the court of common pleas, then the law which in terms attempted to confer on them such a power, was unconstitutional and void, and it conferred no power whatever; and if the two aldermen were constitutionally authorized to hold such a court in conjunction with the first judge, yet if the second associate of the common pleas was not authorized by law to preside

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in or hold the court of oyer and terminer as a substitute for the first judge, then the continuance of the trial before him and the two aldermen was unauthorized, although they claimed and exercised the right *de facto* to hold a court of oyer and terminer in the absence of the circuit judge. The difference between the official acts of *de facto* judges of a court duly organized, and of the *de facto* officers of an unconstitutional and therefore an illegally organized court, is plainly pointed out by judge Robertson of Kentucky, in the two causes reported by J. J. Marshall, in reference to the official acts of the judges of the new court of appeals; which court was declared unconstitutional. 1 *J. J. Marsh.* 205, 206.

[*542] "The constitution is the paramount law to which all courts in the exercise of their judicial powers must bow, notwithstanding any legislative enactments to the contrary. It is not necessary in this case to say that the judgments and proceedings before every tribunal illegally constituted, and in direct violation of a constitutional prohibition, are absolutely void; so that the judges of the court, and all those who had attempted to execute the process issued by them, would be liable as trespassers. But in deference to the constitution, which we have all sworn to support, I must declare, as my deliberate opinion, that when the judgment of such a tribunal is properly brought before this court for review, on a writ of error, if the unconstitutional organization of that tribunal fully and distinctly appears upon the record, it is the duty of this court to reverse or annul that judgment. If, therefore, the other members of this court shall have arrived at the conclusion that the aldermen *ex officio* could not constitutionally execute the judicial duty of a judge of the court of oyer and terminer in the city of New-York, the judgment of death pronounced against the plaintiff in error should be reversed; so that he may be re-tried in a constitutional court of oyer and terminer, whenever the legislature shall provide by law for the organization of such a court in the city of New-York. A new indictment will also be necessary in that case, as I see from the record that this indictment was found at a court in which two out of the three judges thereof sat as aldermen merely.

But if this court should come to the conclusion that aldermen can, in conformity with the principles of the constitution, be *ex officio* judges of a court, it is still necessary to enquire whether the *second associate judge* of the common pleas was authorized by law to preside in the court of oyer and terminer? And if he could do so, then to determine the question whether, under the provisions of the revised statutes, the court was legally organized at the commencement of the trial, when, as appears from the record, *the circuit judge* and *the second associate judge* of the court of common pleas were both on the bench, and acting as judges of the court of oyer and terminer at the same time.

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*Upon the first question, I concur, though I confess with some [*548] hesitation, in the opinion of the supreme court. The revised statutes had authorized the *first judge* of the court of common pleas, together with the mayor, recorder and aldermen of the city of New-York, or with any two of them, to hold the court of oyer and terminer. The act of April, 1839, authorized the appointment of an additional associate judge of the court of common pleas, and declared that the judge so appointed should possess all the powers then vested by law in the first judge of the said court. This grant of power is general ; and is neither in terms or by necessary implication confined to the powers which the first judge was authorized to exercise in the court of common pleas merely. Indeed, such a restricted construction would have excluded him from acting as one of the judges of the court of general sessions of the peace. For by referring to the section of the revised statutes relative to the general session in New-York, it will be seen that the power to hold that court was not given to *all* who should thereafter be appointed by law as judges of the court of common pleas, but to the *first judge* and the mayor and recorder and aldermen merely, 2 R. S. 216, § 29. One of the powers vested by law in the *first judge* was to preside in the court of oyer and terminer with the mayor, recorder and aldermen, or with any two of them, in the absence of the justices of the supreme court and circuit judges ; and another was to hold the general sessions in connection with the same officers or any two or more of them. I think, therefore, the legislature must have intended to confer both these powers on the second associate judge, under this broad language in the act of 1839.

I have not, however, been able to get over the technical difficulty in this case in relation to the organization of the court previous to the time when the circuit judge left the bench, for if a court of oyer and terminer was not legally organized at that time, the judges before whom the trial commenced had not jurisdiction to proceed in the trial ; and a want of jurisdiction appearing upon the record of the court below, may be taken advantage of upon a writ of *error. I infer from the opinion of [*544] the supreme court, that this particular objection was not argued in that court ; and that it appears for the first time upon the points of the prisoner's counsel here. It was an objection, however, which was necessarily presented to that court by the general assignment of errors ; and which, if urged there, could not have been obviated by the public prosecutor. As such, it comes within the exceptions to the decision in the case of *Campbell v. Stakes*, 2 Wendell, 146, that this court would not reverse a judgment of the supreme court upon a question which had never been brought before the justices of that court for its decision. See also *Palmer v. Lorillard*, 18 Johns. R. 343. I cannot, therefore, refuse to give the prisoner the benefit of this objection, if valid, although it comes so late.

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By the revised laws of 1813, 1 *R. L.* 339, § 15, the justices of the supreme court, or either of them, together with the mayor, recorder, and aldermen of the city of New-York, or any three or more of them, of whom either of the justices of the supreme court should always be one, were authorized to hold the court of oyer and terminer in the city and county of New-York. Under this law, any number of the justices of the supreme court were authorized to be present, either with or without the presence of the mayor, recorder, and aldermen; provided there were as many as three judges on the bench, and that at least one of the three was a justice of the supreme court; and the courts of oyer and terminer in the other counties of the state were organized substantially in the same way. The judiciary act of 1828, in organizing the courts under the new constitution, contained a similar provision, authorizing all the judges of the supreme court and other judges who were empowered to hold the circuits in conjunction with the local judges, or any three or more of the whole number, of whom a justice of the supreme court or a circuit judge should always be one, to hold the oyer and terminer. *Statutes of 1823*, 211, § 9. But in the revised statutes, for some reasons not explained in the notes of the revisers, the phrase-

ology of the law was changed so as to permit only one justice of [*545] the *supreme court, or one circuit judge, together with at least two of the local judges in the other counties of the state except New-York, to hold the oyer and terminer; and the provision in relation to the city and county of New-York is, that the court of oyer and terminer may be held "by one or more of the justices of the supreme court, or of the circuit judges, or by the first judge of the court of common pleas of the said city and county, together with the mayor, recorder, and aldermen of that city, or any two of them." 2 *R. S.* 204, § 28. The effect of this last provision was to authorize one or more of the justices of the supreme court, or one or more of the circuit judges, to sit in the court of oyer and terminer with the mayor, recorder and aldermen, or any two of them, but excluding from the court when thus organized, the first judge of the common pleas, who is only authorised to preside in or be present in the court of oyer and terminer as a judge thereof, when a justice of the supreme court, or a circuit judge does not constitute one of the members of the court. This is the only intelligible construction which I have been able to put upon the language of the statute; and as the second associate judge of the common pleas has no other powers in relation to the court of oyer and terminer than such as were vested in the first judge, it follows of course that the court which commenced the trial in this case was not legally organized, as it appears by the record that it was held before two persons who were not authorized to hold it *conjointly*. This is unquestionably an objection more of form than of substance, as it is not probable that the rights of the prisoner were really pre-

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judiced thereby, though the decision of the court upon any question of law that arose might have been left undecided, if the court were equally divided in opinion. In a case involving the life of a fellow being, I do not feel myself authorized to disregard the legal objection to the organization of the court before which he was tried. I must, therefore, vote for a reversal of the judgment, so that the prisoner may have another trial for his life before a tribunal properly constituted for that purpose.

*By Senator DIXON. The question whether the aldermen of [*546] the city of New-York have a constitutional authority to sit as judges of the court of oyer and terminer in that city, is not presented by this case. They have the authority of the statutes of the state to do so. They have, without question or molestation, for 18 years executed that right under our present constitution, and for a much longer time under the old one; and so by public acquiescence they are, and have been for a great length of time, judges *de facto* if not *de jure*, of this court, and also of the courts of common pleas and general sessions of the peace in the city of New-York.

The same may be said of the objection to the associate judge who was a member of the court. If he has not held his seat as long as the aldermen, his tenure of office is at least as plausible and colorable.

Several other exceptions were taken on the trial. Those founded in that part of the charge of the judge in which he withdraws from the consideration of the jury the second count in the indictment, which, to say the least, was best supported by the evidence, and that part of the charge in which the judge defined the import of the first count, and instructed the jury what evidence was proper under it, and in so much of the charge as related to the omission on the part of the prisoner to give evidence of good character, were, in my opinion, well taken, or rather those parts of the charge were, in my opinion, erroneous. But without deciding what influence those exceptions ought to have had on a motion for a new trial, I choose to rest my opinion exclusively on another point.

The court, during a portion of the trial at least, was irregularly constituted. The language of the law organizing the court of oyer and terminer for the city and county of New-York is this: 2 R.S. 204, § 28, "Courts of oyer and terminer may be held in the city and county of New-York by one or more of the justices of the supreme court, or of the circuit judges, or by the first judge of the court of common pleas of the said city and county, together with the mayor, recorder and aldermen or any two of them."

Now granting that the law of 1839, under which judge Inglis [*547] was appointed, confers upon him the power here granted to the first judge, he may then hold the court with the assistance of the "mayor, recorder and aldermen or any two of them." But we shall look here and

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elsewhere in vain for any authority for him to sit in this court associated with a circuit judge. The prisoner claims, as a matter of right, to be tried by a court constituted in all respects according to law. He is entitled to the benefit not only of all the talents and learning of such a court, but of their sympathies, and if you please their weaknesses. The court consisting of the associate judge and two aldermen was complete without the circuit judge. His presence was not required by any existing law or rule of practice; and more, there is no law or rule which authorized it. It was an irregularity, and the prisoner has a right to presume that every influence which such irregularity had upon the incidents and result of the trial was against him.

The case shows that the circuit judge did attend and conduct the trial as presiding officer the first two days, and then left the trial to be finished by the associate judge and aldermen. Is it probable that all questions regarding the admissibility of evidence and the conduct of the trial were settled in the same manner as they would have been if the circuit judge had been absent? It is no answer to say that the chances are equal that the influence of the circuit judge swayed decisions in *favor* of the prisoner. It is enough that it might have been *otherwise*. The prisoner has a right to assume that all questions, as to the admissibility of evidence, which arose on the trial, and were decided against him during the time when the circuit judge presided would, in his absence, have been decided in his favor, and that such evidence as was offered by him, and was excluded by the direction or influence of the circuit judge would, if it had gone before the jury, have influenced their verdict.

I think the prisoner is entitled to a new trial; and that the judgment of the supreme court ought to be reversed.

[*548] 'By Senator EDWARDS. Has the prisoner been tried by a court properly constituted and organized, and has he had the benefit of a trial conducted according to the well established rules of law and evidence, are the questions presented by the bill of exceptions for our consideration.

The court consisted at first of the circuit judge, the associate judge and two aldermen; and after some progress had been made in the trial, the circuit judge abandoned the bench, leaving the cause in charge of the associate judge and two aldermen. When the convention assembled to amend the constitution, it found in existence a court of oyer and terminer, and when it adopted the amended constitution, it contemplated the continuance of such a court; for it gave to the circuit judges the same powers as were possessed by justices of the supreme court in reference to the courts of oyer and terminer; but it did not direct of what grade or number of judges the court should be composed, with the single exception to which I have alluded. As that was then a new office, it became necessary to declare its powers. The

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fair presumption therefore is, that the framers of the constitution intended to leave the formation of this court, with this single exception, as they found it, subject to legislative provisions, both as to the grade and number of officers who should compose it ; not that it should be constituted of the same officers as formerly, for they have no where declared or intimated such an intention, but that it might be as to its formation a subject for legislation, the same under the new constitution as under the old. Had they intended to deny to the legislature this power, it is fair to presume they would have said so in express terms. I am of opinion, therefore, the organization of this court is appropriately a subject of legislation, and was so intended by the framers of the constitution. The legislature in the exercise of their powers have declared by whom these courts may be held, and this is the only legitimate source from whence these courts derive their authority.

In the city and county of New-York, it is provided that courts of oyer and terminer may be held by one or more *of the justices [*549] of the supreme court, or of the circuit judges, or by the first judge of the court of common pleas of the city and county, together with the mayor, recorder and aldermen of the city, or any two of them. 2 R. S. 204, § 28. The fair construction of this provision of the act is, that one or more of the justices of the supreme court, together with the mayor or recorder and aldermen, or any two of these city officers, or one or more of the circuit judges, with these city officers, or any two of them, or the first judge of the court of common pleas of the city and county of New-York, with these city officers, or any two of them, may hold the court ; but this statute nowhere provides that these different grades of judges shall or may be united for that purpose. The statute, in authorizing each of these different grades of judges to hold the court with certain city officers, did not, in my view, intend they might all hold it conjointly. It cannot reasonably be imagined that the legislature intended that the three justices of the supreme court, the eight circuit judges, the first judge and associate judges of the court of common pleas, the mayor and recorder and seventeen aldermen, might all sit at the same to constitute a court of oyer and terminer ; yet such might be the fact if the construction of the statute contended for should prevail. By uniting these different grades of officers, a bench of judges is constituted not contemplated by the statute, and of course forming a different tribunal from what was intended to be created. It appears to me, therefore, the prisoner has not had the benefit of a trial before a court properly organized under the statute. Whether he has been prejudiced by a trial before a tribunal thus constituted or not, is not for us to inquire ; suffice it to say, he has not had the benefit of a trial before a tribunal recognized by the laws of his country for the trial of the crime with which he is charged.

As the organization of this court is the proper subject for legislation, I
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have no difficulty in coming to the conclusion that the first judge, or either of the associate judges of the court of common pleas of the city and county of New-York, together with the mayor, recorder and aldermen, or [*550] with any two of these city officers, may properly hold the court under the provisions of the several acts of the legislature giving them that authority, and that their several acts are in all respects valid under the constitution.

Nor in my judgment is the objection raised by the attorney general that the aldermen could not constitute a part of this court tenable. The aldermen, at the time of adopting the constitution, were *ex officio* judges of this court, and in the constitution it is not said of whom the court shall be composed, but it recognizes the existence of such court by declaring the power of the circuit judges. If therefore the legislature was not to provide for the continuance of the court, how was it to exist after the death of these incumbents? What can preserve and continue the organization of the court but legislative authority; and had the framers of the constitution designed to have taken from the aldermen that portion of the duties of their office, which requires them to act as judges in certain cases, would they not have said so in express terms, and not left it to be inferred that their office in this respect should be classed among what are denominated *judicial*, and because they were not appointed by the governor and senate for the term of five years, that they were to be divested of all authority to act in any judicial capacity?

From the view I have taken of this case, it becomes unnecessary for me to consider the point whether any of the officers alluded to were judges *de facto*. In my opinion, the first judge and associate judges are judges *de jure* and the aldermen are judges *ex officio* under the charter of the city and the legislative acts from which they derive their authority; and as there could be no color or pretence whatever of authority for the different grades of judges to hold this court conjointly, their acts as a court *de facto* cannot be sustained. Nor can it be material whether the circuit judge abandoned the bench or not, so far as it respects the legality of the organization of the court; it not having been duly organized, and the trial having progressed before him, associated with Judge Inglis, his abandonment could not cure

[*551] the irregularity in the formation of the court. Had the court been duly organized, I would have held it manifestly improper for the presiding judge to abandon his seat during the progress of the trial, and more especially so, when the abandonment was objected to on the trial.

Ought the memorandum endorsed in pencil on the coroner's inquest, to have been received in evidence? The statute provides that "the testimony of all witnesses examined before the coroner's jury, shall be reduced to wri-

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ting by the coroner, and shall be returned by him together with the inquisition of the jury." 2 R. S. 748, § 8. The return of the coroner ought at least to show that what he has returned was *testimony* taken on the inquest. The principle that every officer is presumed to do his duty, is not sufficient to convert a mere memorandum either in pencil or in ink into legal testimony. What is testimony? It is evidence, the statement of a witness under oath or affirmation. 2 *Bouv. L. Dict.* 436. To entitle it to be read in a court of justice, it must have the characteristics of testimony, or they must be supplied *aliunde*. In this case there was neither. It did not purport to be the statement of Wright under oath or affirmation, and there was no certificate or even statement of the coroner that it was such, or that it was testimony, or was turned as such, nor was the coroner or any witness called to show that it was testimony taken on the inquest; but the counsel for the prisoner rested wholly upon the statute requiring the coroner to take the testimony, reduce it to writing and return it, and upon the presumption that the coroner had done his duty, when even the return itself shewed that he had executed it in an imperfect manner. Under these circumstances, I am inclined to believe the judge was right in rejecting the memorandum as testimony for any purpose whatever. Our statute is not very precise as to the manner in which the testimony shall be taken and returned; but it requires the *testimony* to be taken and returned, and in order to entitle it to be read on the trial, it must in some way be shown to be the testimony taken on the inquest, or the court is not bound to regard it as such. By the English statute, 7 Geo. 4 ch. 64, § 4, the coroner is required to put in writing the evidence given to the jury "before him, or as much thereof as [*552] shall be material, and to certify and subscribe the same, and also the inquisition taken—yet it appears with all this precision, the deposition of the witness is not permitted to be read in the English courts, without proving that it is the same as sworn to before the coroner, without any addition or alteration. 1 *Phil. Ev. Cowen & Hill's Notes*, 372. But besides this informality, it does not appear the inquest was taken even in the same cause. It was taken on the view of the body of Edward Dennon, and not on the body of Fitzpatrick, for the murder of whom the prisoner was on trial. This, however, would not have prevented it from being read to affect the credibility of the witness, but still for that purpose it was necessary to show it was his testimony. Whatever view, therefore, I can take of this memorandum, I am of the opinion the judge was right in excluding it as testimony.

The next subject which claims our attention is the charge of the judge to the jury, giving his construction upon the counts in the indictment. Although I have considered this part of the case with all the attention its im-

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portance requires, I cannot coincide in the views of the judge. He says the first count was sufficient to comprehend any of the grades or classes of murder embraced in the first and second subdivisions of the fifth section of the act defining murder, 2 R. S. 657, and that if the jury should be of the opinion that the killing of Fitzpatrick by the prisoner, took place either from *premeditated design* to effect the death of the person killed or of any human being, or that it was *perpetrated by an act imminently dangerous* to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, that in either case the crime fell within the common law definition of *malice aforethought*; and if the facts so warranted, it would be their duty, under the first count of the indictment, to convict the prisoner. I concede that there is no very material distinction in the meaning of the expression in our statute, *premeditated design* and *malice aforethought*, and that an indictment

making use of either might be good at common law; and that [*553] *the conclusion of the counts, *against the form of the statute, &c.* may be struck out, and the indictment still be good at common law, though drawn under the statute. 1 Chit. Cr. Law, 101. But that does not remove the difficulty. The first count in the indictment would still be a special count at the common law, and to convict under it the testimony should square with the facts averred—unless you can strike out a portion of them as surplusage, and make a special count a general count, and convict under it as such. The first count charges “that the said Ezra White, him the said Peter Fitzpatrick, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, and from a premeditated design to effect the death of him the said Fitzpatrick, did kill and murder,” &c. Now having averred in this count that the crime was committed with a *premeditated design to effect the death of Fitzpatrick*, are we at liberty to regard this averment as surplusage, and consider the count as though no such averment was made? To constitute a good general count at common law, it was unnecessary that averment should have been made; but having been made, does it not become material? To test the materiality of this averment when once made, let us suppose, as the judge instructed the jury, that the second count in the indictment was disregarded, and the trial was only upon the first count, how would the prisoner prepare himself for trial? He would come prepared to rebut all testimony that went to show he had a *premeditated design* to effect the death of Fitzpatrick, but he might not be prepared to shew that a gang of robbers had conspired against him and that he had armed himself in self defence, and while in the act of defending himself and property, had *accidentally* killed Fitzpatrick, who had no hand in the conspiracy and against whom he had no design. The second count in this indictment was well drawn to apprise the prisoner fully of the crime charged

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against him, and why it was the judge charged the jury to disregard it, it is difficult to conceive. This count well conformed with the great fundamental rule for drawing indictments, viz. "the facts must be so set forth on the record that the defendant may clearly understand the charge [*554] he is called upon to answer, that the court may know what judgment is to be pronounced on conviction, and that posterity may know what law is to be derived from the record. 1 *Chit. Crim. Law*, 190. This count fully apprised the prisoner of the charge he was called upon to answer, as presented by the testimony on the part of the prosecution. But in order to convict under the *first count*, it appears to me the district attorney was bound to prove a *premeditated design* on the part of the prisoner to murder Fitzpatrick, he having so charged; and this being the foundation of his charge to constitute the crime. In the case of *The United States v. Porter*, 3 *Day's R.* 284, Judge Livingston says the court will be more strict in requiring proof of the matters alleged in a criminal than in a civil case. In that case, the defendant was indicted for stopping the mail, and the indictment set out the contract under which the mail was carried, and although he held that the indictment might be so framed as not to require proof of the contract, yet as it stated a contract which was not impertinent or foreign to the cause, he was clearly of the opinion it should be proved. *See also Roscoe's Crim. Ev.* 77; 9 *Yerg. R.* 377: *also Regina v. Dean*, 4 *Lond. Jurist*, 364. From the view I have taken of this part of the case, therefore, I am of the opinion the judge erred in charging the jury that it would be their duty to convict under the first count, and instructing them that they should exclude entirely from their consideration the second count of the indictment.

Nor am I satisfied with that portion of the judge's charge which relates to the general character of the prisoner. I think the case was one that did not call for such remarks, and that they were calculated to prejudice the minds of the jury against him in that respect, and to infringe in some measure upon the great and fundamental principle which presumes a man innocent until the contrary appears. I am aware the supreme court have gone great lengths in presuming bad character, where the contrary does not appear in certain cases. But they have not gone so far in any case as the judge did in the case under review. *He probably relied [*555] principally on *The People v. Vane*, 12 *Wendell*, 78, in which the court held that "evidence of the good character of the defendant on the trial of an indictment is always admissible, though it cannot avail when the evidence against him is positive and unimpeached; but where the evidence is circumstantial, or comes from a suspected or impeached witness, proof of good character is important. A man is not to be convicted because he has a bad character or no character; but in a case like the pres-

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ent, character becomes important, and where no such evidence is produced, the presumption is it cannot be produced, and the further inference is, the defendant is a man of bad character, and would naturally be associated with such men as the witness." That was a case where the principal testimony came from a suspected witness. It was a case of grand larceny for stealing a package of bank bills, and the principal witness was an accomplice, and disclosed his participation in the crime. The case under review is not one where the evidence is circumstantial, or comes from a suspected or impeached witness. It would not be competent for the prosecution to give evidence of the bad character of the prisoner, when no evidence in support of his character had been adduced by him. *The People v. White*, 14 Wendell, 111. *Commonwealth v. Hardy*, 2 Mass. R. 317, note 341 to p. 177. No inference, therefore, ought to be drawn to substantiate a fact the prosecutor could not be permitted to prove. The principle which admits of such testimony in cases of doubt where the evidence to convict is circumstantial, or comes from a suspected or impeached witness, is designed for the benefit of the prisoner, and intended to aid him against a wrongful conviction, and not to prejudice his defence, as may have been the effect in the present instance. I am for reversing the judgment of the supreme court, and granting a new trial.

By Senator FURMAN. In almost innumerable cases, and for a long period of time, it has been held that presumptions against the life of a [*556] prisoner should not be indulged to "produce his conviction ; but on the contrary, should work to his benefit. We are, therefore, not at liberty to presume that the judge was required by sickness to leave the bench during the progress of the trial, unless it appears distinctly upon the face of the record. There was indeed no intentional violation of duty on the part of the judge, and neither are we bound to regard his departure in that light, in order to give the benefit of this objection to the prisoner. So also we are not permitted to presume that when a new judge came to preside in that trial, he knew all the previous rulings and decisions of the court, all the testimony which had been previously given, with its bearings.

In my judgment the court below erred in excluding the coroner's record of the testimony of Wright, the witness, to contradict him ; because Wright himself had previously testified that he was examined as a witness before the coroner on the inquest *ante mortem* of Edward Dennon, and it was to contradict what he had said in relation to that matter, that this record was sought to be offered. It was found in the place, where such a record should be kept, and written upon the back of an inquisition regularly executed by the coroner and his jury, and by the coroner filed in the county clerk's office as required by statute. It thus being produced, if it was not a record with all the presumptions in its favor, such should have been shewn on the part of

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the people by the district attorney. It was also urged that this cannot be a record because it is written *in pencil*. It has, however, been held a compliance with law that depositions are in pencil; that memoranda of agreements between parties are in pencil; and that endorsements upon promissory notes are written with pencils. And the statute, in this case, does not require that these depositions be in writing *with ink*. And further upon the circumstances attending such proceedings, it does seem to me to be a good and sufficient record; the coroner's inquest is not in any case made up and signed by that officer and his jury until after the testimony is taken and completed, which is frequently taken in the open air, or under the most disadvantageous circumstances. After this examination of *witnesses [*557] the coroner, with the jury, retire to some convenient place where they make up their inquisition; which accounts for the depositions being in pencil mark, and the inquisition itself in writing. Besides the law will presume that the coroner, as a public officer, has done what the statute requires of him. It has been intimated that if such a record could be received *in favor* of a prisoner's life, and not be hereafter held to authorize its introduction *against* him, to warrant his conviction, it might be received in favor of the defence in this case. Under no circumstances, even if such matter had been in writing, and a good record, has it been held by any authority recognized as law that it might be offered or given in evidence *against* the prisoner, if the witness who made such deposition was alive; and it is now held by more modern authorities that it could not be given in evidence against the prisoner under any circumstances, thus obviating the only real objection, beyond its not being in ink, which has been made against the introduction of this record in favor of the defence. That such testimony of the record if admitted would have been immaterial, and not have operated in favor of the prisoner's defence, is what the court have no legal authority to determine, and especially so in a capital case. The prisoner's counsel only have the right to judge of the effect of such evidence when given to the jury; and to hold any other and different rule will be to interfere with the province of the jury, provided always such testimony be pertinent and legal.

On the subject of the instruction of the presiding judge to the jury on the frame of the indictment, I think there is a material error. The first count of the indictment is limited to that particular description of murder mentioned in the first subdivision of the statute. To appreciate the importance of this objection it is necessary for a moment to advert to the description of the various grades of homicide recognized by law. Every one who takes the life of another commits *homicide*: 1. It is justifiable or excusable, and therefore no offence at law; 2. it is felonious, and is then either murder or manslaughter. If done without malice *express, or implied, [*558]

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it is manslaughter; and if done with malice express, or implied, it is murder.

The indictment does not charge that the prisoner had killed the deceased with malice express or implied. But charges that the crime was committed with a *premeditated design* to kill Peter Fitzpatrick. These words *premeditated design*, as used by the statute, limit the signification of malice aforethought, to *express malice*. And the words in the first count of the indictment are a description of the particular species of crime with which the prisoner is sought to be charged, and against which he is called upon to defend himself. The statute shows by its phraseology that the legislature designed to describe different grades of malice. So if the public prosecutor gives a particular description of a crime, it has been held he must prove it as he lays it; although in some instances it was not necessary to allege the offence in that particular manner; so choice have all the courts been of the life and liberty of citizens, and thus in 1 *Moody's Crown Cases*, 308, where an indictment describes the crime of bigamy as having been committed by the prisoner in marrying, as a second wife, Elizabeth Chant, *widow*, when it appeared upon proof that she was a *single woman*, it was held by all the judges, that such a variance was fatal. And upon such variances Lord Ellenborough, in *Campbell's Nisi Prius*, has said that the crime must be proved as charged, for there are ways enough to convict the guilty without breaking down the rules established for the safeguard of the innocent.

It has been held by some that such particularity might be rejected as surplusage. I cannot accede to this doctrine, and believe the court never has a right to reject any thing which is descriptive of the offence. And the instance to which the judge refers, in the opinion of the supreme court, is in favor of life, but, in my judgment, the doctrine which he seeks to sustain upon it will give the court a right to convict of a higher offence on an indictment

[*559] for manslaughter. It is, I think, clear that the words in this indictment

are *descriptive* of the offence, and have no proper analogy with the instances cited in the opinion delivered in the supreme court. The second count of the indictment contained an accurate description of the offence as proved, (if any conviction should have been had,) but this count having been taken from the consideration of the jury, I cannot see how the testimony offered could have been applied to the first count, for there is no testimony which shows any express malice against Fitzpatrick.

It has been said that there is nothing objectionable in the charge of the presiding judge, that "when the scales of justice are nicely poised, the evidence of a good character and virtuous life, had great weight in turning the balance in favor of the prisoner; and that in this case there was an absence of such testimony on the part of the prisoner;" and it has been further

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urged, that the whole of the judge's charge is not *here*, and that we are to presume that he also charged the jury, that if they had any reasonable doubt on their minds, they should permit it to weigh in favor of the prisoner. In my judgment, even if we should admit such presumption, (although I must protest against all these presumptions on a capital trial,) it does not do away with the strong objection which exists against it. The most honest and virtuous man in the community might be sacrificed on that rule. Any one of the members of this court some thousand miles from home, among strangers, might be charged with murder, (things full as extraordinary as that have happened,) and although his character might be unspotted, and he be, indeed, noted for his "good character and virtuous life" at home and among his acquaintances, yet upon such a trial for murder, it might be out of his power to produce a single witness to prove such his good standing and reputation; and upon the rule here laid down, he might in a doubtful case, from the want of such testimony, be convicted, although entirely innocent. The judge had no right in his charge to give to the people the benefit of evidence against the good character of the prisoner, which they would not have been allowed to prove by direct testimony. I cannot see from the reading *of this charge of the judge how it could possibly have operated in any other way upon the minds of the jury than to induce the conviction of the prisoner; and that it never could have operated in his favor.

The court are not at liberty to convict a man because he has been vicious; if such be the fact, it should operate as a reason why he should be spared in doubtful cases of life and death, in order that he may repent of his evil life, and obtain a pardon for his offences from that higher tribunal at whose bar we must all sooner or later appear.

I think the court of oyer and terminer as constituted upon the trial of this prisoner, with the union of the assistant judge of the common pleas with the circuit judge, was not organized in the manner provided by statute; although I think that either of those officers have the right to preside in that court. But I cannot recognize the right of questioning in this sideway the constitutional right of the mayor and aldermen of the city of New-York to hold that court, and think that a matter of such importance should only be tried on a plain and direct issue involving that question on a *quo warranto*, and for that reason I prefer not here to examine that point.

There is, however, sufficient in this case to induce in my mind the conclusion, that the judgment of the supreme court should be reversed, and that the prisoner should have the benefit of a new trial.

Senator Root said that he was of opinion that the judge at the trial erred in the observations made by him to the jury in respect to the *absence of*

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proof of good character, because the effect upon the minds of the jurors may have been injurious to the prisoner. A prisoner is *presumed* innocent until his guilt be proved. Nothing, therefore, should be *presumed* against him which may affect him on the question before the jury. He added, that his principal object however in rising, was to enter his protest against any decision in this case upon the question of the organization of the court. The judges at all events were judges *de facto* which was enough to estop the prisoner from raising any question upon that point.

[*561] "By Senator VERPLANCK. The first question in this case, as it is presented to this court, is as to the constitutional right of the aldermen of the city of New-York to sit as judges of the court of *oyer* and *terminer*; or in other words, whether the provision of the revised statutes making two at least of the elective city magistrates necessary constituent members of that court in the city and county of New-York, is not repugnant to that section of the constitution, art. 4, § 7, which expressly provides, that "all *judicial officers*, except justices of the peace, shall be appointed by the governor and senate"?

The very serious difficulties which exist as to the question of the constitutional right of the city elective magistrates to act as *ex officio* judges of the county courts apply but partially to the present case. The exception of the constitution (as it now stands, since the last amendment of that section,) is positive as to justices of the peace. The amended article relating to the election and term of office of justices of the peace, refers expressly to the justices of the several *towns* of the state. Those in cities are left to the general regulation of law; nothing being prescribed in regard to them. They may be either elected or appointed annually or for a longer term. The city charter constituted the aldermen justices of the peace, under the English crown, and the act of the 30th January, 1787, conferred upon them the powers of justices of the peace in this state. This provision remains unrepealed by law, and there is no constitutional disability to prevent aldermen from acting as justices. Now I see no ground for thinking that the legislature might not in its discretion direct the *oyer* and *terminer* to be held by any high *judicial officer*, associated with two justices. Such in point of fact is frequently the composition of that court in England, and I believe in some states of this union. The aldermen of New-York might therefore, I think, as justices, be constitutionally members of this court.

But there is still another ground on which the constitutionality of the revised statutes, in thus composing the city court of *oyer* and *terminer*, may be safely placed. The constitution has provided (art. 7, sec. 14),

[*562] that nothing contained in this constitution shall *annul* any charter to bodies politic or corporate granted by the king of Great Britain or persons acting under his authority, before October 14, 1775, or

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shall affect any such grants or charters since made by the state. The language of these provisions is general, but it is also guarded and cautious. The colonial charters are not so ratified as to be placed beyond the control of the legislature; they are merely not annulled by the new constitution, which is also not to effect any subsequent grants or charters. Now the old colonial city charter provided "that the mayor and aldermen for the time being, shall be justices assigned of oyer and terminer, &c. The act of February, 1788, without any repeal of this charter provision, also granted to the mayor, recorder and aldermen the authority of commissioners of oyer and terminer, under the state of New-York, with power to hold such courts, in conjunction with a judge of the supreme court; thus giving effect to the provision of the charter under the new order of things. All the subsequent legislation in relation to the city courts, left that power unaffected, except only in authorizing some other judicial officer to preside with the aldermen. The revising legislature, in 1828, finding the *ex officio* right of the aldermen to sit as commissioners of oyer and terminer, which was conferred by the charter, and recognized by subsequent amendatory acts neither annulled by the new constitution nor repealed by any prior law, had a constitutional right in their discretion to make these magistrates necessary members of the court of oyer and terminer for the city, as that court was constituted by the revised statutes. I find no cause of error here.

II. I assent to the reasoning of the supreme court, as to the lawful authority of the *associate judge* of the common pleas to sit in the oyer and terminer as a presiding judge, and to the construction they have given to the several statutes relating to the powers and duties of the judges of the N. Y. common pleas.

I think moreover that the fact of the circuit judge quitting the court during the trial, if he had left what without him would be a competent court, all the members of which had authority to sit, and [*563] had sat throughout the whole case, though it was irregular, does not necessarily vitiate the verdict. The sudden illness of a judge in any court composed of several members, or any similar unavoidable necessity, must have often produced the same result, yet the decisions of courts have never been questioned on that ground. If a court which was competent without the member who left the bench before the case is finished, is left, it can never be *presumed*, that the presence at the beginning and the subsequent absence of one judge, could have affected the decision injuriously to the prisoner. I say that it cannot be presumed, though there might be a remote possibility that it did so.

But a more serious difficulty arises from the same circumstance, growing out of the doubt whether according to the provisions of the revised statutes respecting the oyer and terminer in the city of New-York, the *associate*

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judge had any right to sit as a mere associate with the aldermen, or at all, except as the presiding judge holding the court. If he could not sit as an associate while the circuit judge presided, then there was no one competent court sitting throughout the trial, but it was conducted in part by one and in part by another court. The literal construction of the statute would lead to this conclusion, as has been shown by the chancellor, and though it is with great hesitation, yet as it is in favor of human life, and in relation to the organization of a court of criminal jurisdiction, I come to the conclusion that the prisoner is entitled to the advantage of the strictest interpretation of the statute.

III. But supposing the court to have been in any respect irregular or unconstitutional, can its acts be now impeached or set aside, and the conviction before us reversed as *coram non judice*? The supreme court hold that as the aldermen, if not actually rightful judges, holding *de jure*, and constitutionally, yet sit with the legal presumption of right under the express sanction of a law to be presumed constitutional until judicially decided not to be so, they are therefore judges *de facto*—their acts are valid, “and must be obeyed and respected until judgment of ouster is pronounced against *them in the proper proceeding for that purpose.”

[*564] “This is a case,” says Judge Bronson, “where officers having apparent authority to do the act, have rendered judgment between the people and the prisoner, and neither party can in this collateral way call in question the title of the judges.”

It is unquestionably a well established principle, that the acts of all public officers having the presumptive evidence of title by law, commission, election or otherwise, and the actual possession of office, are valid, as far as they affect the interests of the public or of third parties, and that they cannot be impeached collaterally. Thus, for instance, to take an example suggested by Judge Bronson, the county clerk recently ousted from his office held under color of an election, but illegally; yet the rights acquired by individuals under deeds or mortgages recorded by him, or verdicts entered by him, cannot be inquired into on that ground. They are valid and effectual to all intents. This arises from the very necessity of the case. Nothing could be certain or secure if the legal rights immediately depending upon the innumerable acts of public officers affecting private citizens could be shaken by any accidental defect in their election or appointment, or in the rights of those by whom they were elected or appointed to vote or to hold office. When, therefore, those whom the constitution of our political society has constituted the judges in the first instance of such elections or official trusts, have given the proper presumptive evidence of official authority, whether by law, if it be grounded on legislative sanction, or by commission or certificate, as the case may be, as to elective or appointed magistrates or

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officers, the actual public officer must for all the ordinary purposes of society, be the rightful officer until those to whom the constitution and the laws have confided the duty and the power to examine his title to office, have decided against him. Nor can I doubt that this principle applies generally to judicial officers as well as to mere ministerial or executive functionaries, since the reason and public necessity of the matter are the same in both instances. Nevertheless I am strongly inclined to the opinion that the principle will not cover a case like this. The rule, wise, *salutary and [*565] necessary, is this: that the validity of acts of public officers shall not be collaterally impeached on the ground that though they are in possession of office, and have entered upon it without usurpation, and under presumptive evidence of title, they are not rightfully so in possession. In the language of the supreme court of Massachusetts, "It is an established principle of law, that the acts of an officer having color of title in the exercise of the ordinary functions of his office, are valid in respect to the rights of third parties, who may be interested in such acts. The adoption of such a rule is necessary to prevent a failure of justice, and the great public mischief which might otherwise be apprehended. 15 Mass. R. 135. Yet it has always been expressly held, that any citizen may directly contest the official acts of any such officer, such as he can justify only on the ground of rightful title, whenever those acts bear directly upon the party contesting them, and do not involve those of third persons. Thus in one of the cases cited with approbation by Judge Bronson, in which it was held that the court would not decide in a suit between third persons whether a sheriff was legally in office *de jure*, and not merely *de facto*, Chief Justice Parsons adds: "If an action should be commenced against one claiming to be sheriff, for an act which he does not justify but as sheriff, or if an information should be filed against him, in either case he would be a party." *Fowler v. Beebe*, 9 Mass. R. 234. Here it will be seen that this great judge puts the direct right of the citizen to contest the acts of any public officer, when they directly affect him and do not implicate the rights of others, upon the same ground as that of the state to inquire officially into his title. So again in our own courts, when the question has been between an officer acting under the authority of a court martial, and a citizen fined by that court, as in the case reported 19 Johns. R. 33, there appears to have been no doubt of the authority of the supreme court to look into and decide upon the validity or regularity of the constitution of the military tribunal.

Again; although when rights are once fairly acquired and vested under the decision of a legal court, that decision *cannot [*566] be inquired into on the ground of the court having exceeded its jurisdiction, yet the law has expressly provided a remedy against such over-leaping of the limits of jurisdiction for the party, as long as he is still be-

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fore the court either civilly or criminally, in a plea to the jurisdiction, which if decided adversely to the party by the court itself, may be carried up to the highest appellate tribunal. If then the jurisdiction of a court legally constituted in itself, can thus be contested for exceeding the bounds of its just authority, why cannot the jurisdiction be contested for a still stronger reason, the legality of the constitution of the court itself?

Nor can I allow that the party in a criminal case, waives or loses his right of contesting the decision of an unconstitutional or otherwise illegal tribunal, because he does not do so at the earliest stage of the proceedings in the technical form of a plea to the jurisdiction. Even in civil cases our supreme court has laid down the principle in an express decision to that effect, that “where a court has no jurisdiction originally, it does not acquire it either by consent of the defendant or his confessing judgment.” *Caines' R.* 129. Much more should this principle find application in a criminal case where, to use the strong language of Chief Justice Spencer in *The People v. M'Kinstry.* 18 Johns. R. 232: “It is a known principle in criminal law and especially where life is in question, to consider the prisoner as standing on all his rights and waiving nothing on the score of irregularity.” In a criminal case the whole question of law and fact is involved in the plea of *not guilty*. Every error manifest on the record may in some way or other be brought under the review of the appellate tribunal, and no grosser error can be committed than the intrusion of unconstitutional judges into a court in itself legal. In England it has been expressly decided that “if a sentence is passed by a person who had no valid commission to judge the parties, it is void and may be altogether set aside without a writ of error,” and summarily. *See 1 Chit. Cr. Law. 744, and authorities there cited.* Also 4 *Black. Comm.* 394. I should be among the last to deny that the past acts of officers *de facto*, ministerial, legislative or judicial cannot [*567] be indirectly, collaterally or “subsequently called into question so as to disturb past and unquestioned adjudications, or other official acts, or to shake vested rights thus acquired by third persons; but I cannot extend this rule of peace and security beyond the purposes for which it was established. I cannot apply it to the direct action of the party aggrieved appealing against the authority of an unlawful magistrate, to a higher and appropriate court, and this whilst the case is yet open, *dum adhuc versatur urna*, when no sentence has been passed, no final adjudication had, when no man's rights but his own are in question or can be injuriously affected; when he invokes the constitutional tribunals of his country not in vengeance or for restitution as to the past, but to interpose the shield of rightful judicial protection against the sword of power wielded by an unlawful hand. I can neither regard as sound law or wise public policy any more than as consistent with a republican regard to the rights of private citizens, to hold that

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the trial of the question of the constitutional or legal power of any officer or judge should depend solely upon the discretion of the attorney general, and remain unquestioned until he impeaches it in the name of the people, whilst the citizen upon whom such unlawful authority acts immediately, and may bear hardly, has no means of defending himself and appealing from this the greatest of all errors that can occur. If, therefore, in this case the composition of the court be such as would, upon information filed by the attorney general, be pronounced unconstitutional, I cannot doubt but that the same question may be directly brought up in error by the prisoner denying the jurisdiction, whilst his case is still open and undecided.

Thus in respect to the judicial character of the aldermen. I agree with the supreme court that the aldermen, whether constitutionally or not, *are* judges of the oyer and terminer— are so *de facto*, their commission being written in the statute book which is to be presumed valid and constitutional throughout until it is otherwise decided as to any provision. I agree, therefore, that their acts as judges cannot be impeached, subsequently, collaterally, or by private suit or criminal proceeding against them as individuals under any *view of their constitutional rights. Beyond [*568] this I must dissent from the doctrine, and must hold that the direct denial of their jurisdiction or authority, before the final adjudication of any case, by the party over whom they claim to exercise jurisdiction, whether it be by plea or exception on any cause of error upon the record, is one of the direct and constitutional modes provided for the protection of private rights against legislative or executive aggression. If, therefore, a majority of this court should differ from me in the views I have taken of the rights *de jure* of the city magistrates, the exception seems well taken, and the trial should be considered as a nullity.

IV. On the question of the error in refusing to admit, as evidence in favor of the prisoner, the informal and uncertified return of evidence filed by the coroner, I concur with the judges. Could it have been received in this case, merely in favor of human life and without introducing a general rule allowing similar evidence, which would ordinarily operate against the accused, and be subject to great abuse, I should have wished to admit it. As it stands, without any attestation of oath or other proper formal authentication to the evidence, and open to any alteration, accidental or intentional, in the various hands through which it may have passed, it seems to me to demand some additional attestation to make it evidence, even for the secondary purpose of impeaching other contradictory statements, for which it was produced. If it was important, the testimony of the coroner himself should have been called to support its genuineness, or in defect of that, some other adequate external proof. But there are yet two other grounds of error assigned, and upon both or either of them, I am clear that the prisoner is entitled to a new trial.

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V. The presiding judge in his charge excluded from the consideration of the jury the second count of the indictment, and thus confined their attention to the first count alone, which charged the prisoner with killing and murdering Fitzpatrick "wilfully and of his malice aforethought and from a premeditated design to effect the death of the said Fitzpatrick, against [*569] the form of the statute," &c. Now it "is very clear that whether there was evidence to support the charge of general malice aforethought, or the killing by an act imminently dangerous to others, or not, there was no evidence whatever to support the charge of a premeditated design against the individual. All the evidence in this case went either to prove only *manslaughter*, or "the killing without a design to effect death in the heat of passion." 2 R. S. 661, § 10, or else that species of murder defined as being "perpetrated by an act imminently dangerous to others, although without any premeditated design to effect the death of any particular person." 2 R. S. 657, § 5.

The judge, however, charged that this count was sufficient to comprehend any of the grades or classes of murder set forth in the statute, whilst the supreme court decide that the addition of the charge of premeditated design, as according to the statute, did not vitiate the complete charge of murder at the common law which the count contains independent of the allegation of premeditated design. "You may reject this altogether, and still a murder remains charged in the technical language of the common law." "The averment of premeditation is mere surplusage."

I think otherwise. It seems to me that the court has no right to reject what was thus specifically charged as a substantive description of the particular crime. The distinction of unjustifiable killing with premeditated design, as one of the particular classes falling under the general head of malice aforethought, and quite distinct from malice implied in the killing, in the commission of some act dangerous to human life or otherwise, is an old one, and may be found in all the books of the common law. 1 Hawkins' P. C. 189. Accordingly our statute has, in defining and classifying the several species of murder, placed in the first class as distinguished from the others, the killing with premeditated design to effect the death of the person killed. By the count in question, though the general common law offence of killing with malice aforethought is laid, yet the particular nature of the crime is also distinctly and specifically charged, in the words of the statute, and expressly referring to it as "against the form of the statute in such case," &c.

[*570] 'I understand the common law rule to be, that an indictment may be good when the offence is charged in general but intelligible terms sufficient for the description without further allegations; and that moreover, a count may be divided by the jury, and certain allegations re-

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jected if the rest constitute a complete offence ; yet when allegations are made, if they be such as to enter substantially into the description of the crime, so that they cannot be severed from it without rendering the description applicable to another and different offence, (different in fact if not in nature,) then such allegations must be proved, or the indictment is not sustained. Thus, in the recent case of *The Queen v. Dean*, in England, where, in an indictment for a conspiracy, the overt acts were averred to have been done with intent to defraud one *Gompertz*, who was entitled to receive a certain sum of money, and the jury found that he was not so entitled ; it was held that the indictment could not be sustained, though a verdict of guilty was found. "Lord DENMAN, C. J. : Suppose I had said to the jury, it is nothing to do with the question whether the intent of the defendant was to deceive Gompertz—the jury might have found the defendant guilty of a conspiracy, but it would not have been the conspiracy laid in this indictment. We are of opinion that all the subsequent allegations are so bound up with the allegation of an intent to defraud the person named, that they cannot be disengaged from it ; and that, it being disproved, there is nothing for them to rest upon ; and both counts are open to this objection.—*Verdict of not guilty to be entered.*"

Now, our revised statutes having set forth a distinct classification and definitions of several kinds of murder, the only count to which the jury's attention is directed, (the other being expressly excluded from their consideration) charges the killing of Fitzpatrick to have been in the manner and according to the description of the first class of murder, "with premeditated design to effect his death." The best text books of criminal law describe an indictment as a brief narrative of the offence charged, which must contain a certain description of the crime and the facts necessary to constitute it. 1 *Chit. C. R. L.* 168. This definition has been adopted by Chief Justice Savage as the foundation of his [*571] reason in the *per curiam* opinion in *The People v. Gates*, 18 *Wendell*, 317. Can this be called in any sense, a certain description of the crime charged, when it is in fact the description of another crime of the same nature, expressly distinguished from it by statute ? Supposing proof had been offered that Fitzpatrick was accidentally killed whilst the prisoner was in the commission of a burglary, which would be a murder of a very different sort, falling under another description of the statute. Here, then, is an offence quite different from the one charged, for which the prisoner and his counsel would not only be unprepared, but they would have been led to prepare against another and different charge. It would be a surprise upon the prisoner, by which the most innocent might be made a victim, if such evidence could be permitted to support an indictment for premeditated murder. It is looking to the mere letter, not to the intent of the statute or the

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meaning and object of the indictment, to hold that you can reject all that is specific and descriptive of a particular crime charged, and thus leaving the general charge of murder, consider it well supported by evidence of a crime expressly distinguished and otherwise described in the statute, and in itself essentially different ; as on the supposition just made of a burglary, in which the deceased was accidentally killed. To my understanding, the whole statutory description of the crime, as set forth in this indictment, is (according to Lord Denman's rule) bound up together, and cannot be dissevered without making a different statutory offence. It is true, that according to the reason of the thing, as well as the decision of this court in *The People v. Enoch*, 13 Wendell, 159, a general count charging murder with malice aforethought, and thus apprizing the prisoner of the broad nature of the charge which he must meet, would be sufficient, and would be sustained by evidence of any sort of murder whatsoever, within the statutory definitions. This latitude is allowed to the prosecution in deviation from the usual scrupulous caution of our criminal law, on the ground of absolute necessity.

[*572] For, as Chancellor Walworth has well said, in the case just cited, "to require the public prosecutor to aver in *hac verba* the particular intent, would be productive of great evil. In murders committed in secret, it is often impossible to ascertain the particular design. It is now difficult to convict a secret murder, it would then be impossible." Therefore, the law has been compelled to arm the public prosecutor with the power of charging the felonious intent or malice in the most general terms, when the ends of justice would be frustrated by imposing the necessity of a more precise specification of the statutory characteristics of the crime. But I can find neither reason nor authority for extending the power of the prosecutor beyond this limit. In my view, the reason, and the policy of the law, and the analogy of decisions all show that the charge of a murder of one specific class set forth by its legal characteristics is not sustained by proof of commission of a crime of another distinct class. The same principle that requires proof of such facts or intent averred in the indictment as enter substantially and essentially into the specific crime charged, demands also proof of the specific nature and intent.

A general description of murder, in its widest and broadest sense, may, indeed, legally, as it does logically, include the specific classes or subdivisions of the crime, but it seems equally illegal and illogical, to maintain that the description of one class or subdivision, can include another crime so charged. What may have been the effect of the rejection of this principle upon the case now before us, I do not conjecture, nor is it at all material. It is the general operation of the law we are to regard ; and in that point of view, I consider the doctrine of rejecting as surplusage any of the material averments of the indictment, as dangerous to the rights of every person accused of any of the graver crimes.

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It is true, that under both the common law and our own statutes, a person indicted for a higher offence may be convicted of a lower one of the same nature; as one indicted for murder may be found guilty of manslaughter. But, in the first place, this is an express provision of law, and is not to be extended beyond its direct exception to the more general rule, that a man cannot be indicted for one crime and convicted of another. In the next place, this is not a rejection of any part of the indictment as surplusage. It is passing upon the whole as it stands. For instance, the unlawful and designed killing is found, the premeditation is not found; both averments are passed upon, when a verdict of manslaughter is found.

VI. The last exception is founded on the judge's charging, "that in all doubtful cases, where the scales of justice are nicely poised, the evidence of a good character and a virtuous life had great weight in turning the balance in favor of the prisoner. That in this case, there was an absence of such testimony on the side of the prisoner."

Here the consideration of general character was distinctly presented to the jury; and the absence of evidence to show a sober and virtuous life, was suggested in such a manner as naturally to lead their minds to the opposite conclusion; that no such evidence was offered, because none could be given, and that his course of life must, therefore, have been profligate or immoral.

On this head, I think the argument of the prisoner's counsel is irresistible and conclusive. The public prosecutor had no right to introduce evidence of a bad general character against a prisoner. The offence must be proved substantially. The humanity and justice of the law give the prisoner the right of adducing evidence of virtuous character to show the improbability of the charge, but otherwise, the law must hold every man, whether virtuous or vicious in his course of life, to be innocent of any specific crime until he is proved guilty. Accordingly says Chief Justice Parsons, "it is not competent for the prosecutor to go into the inquiry of the defendant's character until he voluntarily puts it in issue." 2 *Mass. R.* 318. See also to the same effect, the opinion of our own supreme court, by Judge Sutherland, 14 *Wendell*, 654. Yet here, the judge gives by mere inference to the absence of evidence of a sober and virtuous life, the weight of direct evidence of character, which the law would not suffer to be made the ground of conviction.

"The rule and practice of our law in relation to evidence of [*574] character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike "for the evil and the good, the just and the unjust." Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a con-

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trary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, profession, manners, upon the minds of honest and well-intentioned jurors.

Take the very case of the unfortunate young man before us. Suppose the public prosecutor had been permitted to show, as possibly he might have been able to do—(and I am taking the worst supposition against the prisoner that any facts before us authorize us to make, and it is still but a supposition,)—supposing the public prosecutor had shown that the prisoner, though without any impeachment of gross crime, had led a careless and dissolute life even beyond the ordinary license which might be pardoned to the levity of youth—the fault of defective education, and the absence of parental restraint. What would be the effect of such evidence? Probably to excite in the minds of some judge or juror prepossessions against the prisoner, and to induce them to give the greatest weight to all the testimony adverse to him. Yet to those who know or who feel how mysteriously virtue is mixed with vice in human nature—how much of evil there is in the good, and how much of better feeling is often left in the profligate, what does calm and sound reason infer from such testimony as to any malignity of heart capable of deliberate premeditated murder on slight provocation? I think it should have no such weight or tendency at all, even when such proof of character was presented in its most direct form. Can it be permitted then to have such weight when used inferentially and in fact conjecturally—I am confident that it ought not to be so permitted.

[*575] “In all doubtful cases,” to use the language of the charge, “where the scales of justice are nicely poised,” the right legal presumption is in favor of the prisoner’s innocence; and that presumption should not be permitted to be disturbed by any inference whatever from the absence “of testimony to prove good character and virtuous life.”

The principles I have stated and reasoned from are well supported by authority, see *Commonwealth v. Hardy*, 2 Mass. R. 310; *The People v. White*, 14 Wendell, 111; *Buller's N. P.* 296; *Chitty's Cr. Law*, 574, 5, in spite of an adjudged case or two to the contrary, as *The People v. Vance*, 12 Wendell, 78, in our own supreme court some years ago. If those cases are considered as of authority in spite of the opposing weight of decision and of reason, then I do not hesitate to say, that never having received the sanction of the highest appellate court, nor been embodied in our law by long and uncontested use, we ought, upon principle, to overrule them.

By Senator WAGER. The question raised by the first point for the prisoner, that the court was illegally constituted, inasmuch as the two aldermen had no legal authority to sit as judges thereof, has been so fully considered

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in the supreme court and in this court, in the case of *The People v. Varian and others*, that I deem it unnecessary here to make any remarks upon it. The reasoning of the supreme court upon this point, in that case, is to me perfectly satisfactory, and establishes the constitutional right of the aldermen to sit and act as judges in the court of oyer and terminer. This conclusion also renders it unnecessary that I should pass an opinion upon the question made upon the argument, whether the aldermen, though not judges *de jure*, were judges *de facto*, acting under color of office, so as to render their acts valid as regards the prisoner upon trial. Some of the members of this court have expressed an opinion that their acts as judges *de facto* would be void as it regards the conviction in this case, if the constitution has abrogated their right to act as judicial officers ; but as I am satisfied that the constitution has not thus operated upon them, and that they *were judges *de jure*, I shall forbear expressing any opinion up- [*576] on this question. It would not influence my own judgment upon the final vote to be given by me.

It is alleged that the abandonment of the bench by the circuit judge during the progress of the trial, left the court illegally constituted, and consequently vitiated all the subsequent proceedings. This question depends upon the power of the *associate judge* to preside at the oyer and terminer and hold that court. If he had the same power as the first judge of the New-York common pleas, to hold it in connection with two aldermen, in my opinion he had a right to sit in connexion with the circuit judge, up to the period of abandonment ; and down to that period constituted one of the members of the court. By the revised statutes, 2 R. S. 204, § 28, courts of oyer and terminer may be held in the city and county of New-York, by one or more of the justices of the supreme court, or of the circuit judges, or by the first judge of the court of common pleas of that city and county, together with the mayor, recorder and aldermen, or with any two of them. The first judge of the county courts of the city and county of New-York, 2 R. S. 216, and the mayor, recorder and aldermen of the said city, or any three of them, of whom the said first judge, mayor or recorder are always to be one, have power to hold courts of *general sessions* in and for the said city and county of New-York. By the act of 1834, *Statutes of that year*, ch. 94, an *associate judge* of the court of *common pleas* for the city and county of New-York is authorized to be appointed, with the same power to hold *said* court as the first judge thereof ; and may equally with him, as presiding judge, authenticate the records of the court. The fourth section provides that the first judge and associate judge shall, except when sick, &c. have sole and exclusive authority at chambers touching any suit or proceeding in the court of *common pleas*. By the fifth section, “ all the powers vested in the first judge, by virtue of the statutes of this state relative to any legal proceed-

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ings, are given also to the associate judge ;” the section then provides that any proceedings commenced by one of said judges, may, in his absence, [* 577] be continued, “decided and perfected by the other of said judges.

By the sixth section, the associate judge is clothed with the same power as the first judge, to hold and preside in the *general sessions* of the peace. The act provides that it shall continue in force for the term of five years. The act of 1839, *Statutes of that year, ch. 116*, under which Judge Inglis, the associate judge who presided in this case after the circuit judge left the bench, was appointed, provides for a continuance of the act of 1834, above referred to, and “that there should be appointed for the court of common pleas an additional associate judge, who is declared to possess all the powers now vested by law in the first judge of the court. If the act of 1839 stood alone and unconnected with the act of 1834, there would be some reason for believing that the legislature intended by its provisions to clothe the judge appointed under it, with all the judicial powers possessed and exercised by the first judge, and that under this authority he had a legal right to hold the court of oyer and terminer as the presiding judge thereof ; though, as a general rule, a power so important as that of presiding at a trial, where the life of a human being is at issue, should be clearly and specifically given, and not left to inference from any general delegation of authority.

But when two statutes are considered together, in order to give a proper construction to the act of 1839, and they may be so considered, for they are in *pari materia*, both seeking to add additional legal force to the court of common pleas, I think that great doubts at least will be entertained whether the legislature intended to clothe the associate judge with the power claimed for him by the counsel for the people. All that can reasonably be urged under the act of 1839 is, that it created an additional associate judge for the court of common pleas, and clothed him with the same powers with which the legislature had invested the associate appointed under the act of 1834. If the legislature in 1839, in consequence of discovering that they had not in 1834 gone far enough, and had not given full powers to the associate then provided for, intended to give him full power to pre-

[578] side at and hold the “court of oyer and terminer, they would, beyond all doubt, have conferred the power in plain and explicit terms, and they would at the same time have raised the associate appointed under the act of 1834 to the same grade of power conferred upon the additional associate judge. They would not have sought to do this by a general grant of powers which is, at best, liable to a doubtful construction. If the general grant of power by the act of 1839 authorizes the additional associate to hold the oyer and terminer, it confers more power on him than the associate appointed by the act of 1834 possessed, by a fair and legal construction of the act, or than he exercised under a practical construction of

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the act given to it in the city of New-York ; for it is understood, that prior to the act of 1839, the associate did not claim the power of holding or sitting in the court of oyer and terminer. The fifth section of the act of 1834, in my opinion, conferred upon the associate appointed under it only such powers, "relative to any legal proceedings," as were solely possessed by the first judge by virtue of his office and the statutes of this state ; or in other words, power to do business at chambers as a justice of the supreme court, and such other business as he could perform alone, without the aid of other judges. This opinion is derived mainly from the relation in which the words conferring the power stand to those which, in the same section, provide that "any proceedings commenced by one of said judges may, in his absence, be continued, decided and perfected by the other of the said judges." The words "any proceedings," in the latter clause of the section, evidently refer to the same "proceedings" which are mentioned in the former clause of the section. The latter clause controls and limits the general words of grant used in the former clause, and confines it to such business only as each of the said judges might transact singly by virtue of his office. It can hardly be pretended that one of these judges, under the latter clause of the fifth section, would be authorized to commence a trial at the oyer and terminer or in the general sessions, and progress for some way in the trial *without the presence of the other, and then abandon the bench [*579] and leave the other to finish the trial.

My opinion in relation to the construction to be given to the fifth section of the act of 1834 is confirmed and strengthened by the fact, that the legislature in the sixth section of the same act deemed it necessary, by specific language, to confer upon the associate judge the power to hold the court of *general sessions* of the peace. If the general power contained in the fifth section is as broad and extensive as is contended for by the counsel for the people, the sixth section was entirely unnecessary. If it be said that it was added by way of more abundant caution, it may with force be asked, why did not the legislature exercise as much caution and circumspection in relation to the oyer and terminer, which is certainly as important a court as the other, and as well known to the public and the legislature ? A fair, and as I believe a legal construction of the two statutes referred to will confine the powers of the two associate judges to the court of common pleas and the court of general sessions, and such chamber duties as could be performed by the first judge.

A construction, regarding the statutes, declaring the judges who may hold courts as a *designatio personæ*, without the power in any other persons or judges to hold them unless expressly authorized by the legislature so to do, would be doing no great violence to their meaning, and would not be productive of any public injury. But as the view I have taken of

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the acts of 1834 and 1839, renders this construction unnecessary, I forbear expressing a decided opinion upon this particular point.

The view I have taken, also renders it unnecessary that I should express any opinion upon the legal effect of the circuit judge's leaving the bench during the progress of the trial. Such conduct might break up the whole harmony and consistency of a trial by introducing entirely contradictory and conflicting decisions, whereby the prisoner upon trial, might be greatly prejudiced.

[*580] As it regards the reading of the *memorandum in pencil* on the back of the coroner's inquisition, purporting to be "the testimony of Wright, the watchman, I think the court decided correctly. It had no marks of authentication about it except that it was an endorsement in pencil under the heading "Witnesses." It might have been written by a person not authorized. It should, at least, have had the signature of the coroner to attest its genuineness, or it could not have legally been admitted to be read without preliminary proof showing that it was the testimony as taken down from the witness. It is true the coroner must be presumed to have done his duty in reducing the testimony of the witnesses to writing so as to have returned it together with his inquisition, but this he may have done upon another paper properly authenticated by him ; for there is nothing in the statute requiring the testimony to be annexed to the inquisition returned. I do not believe it was necessary that the deposition should have been subscribed by the witness, because I find nothing in the statute requiring it. But at the same time there would be a degree of looseness in admitting such a paper to be read without some marks of authentication, in all of which the writing is deficient. It was no part of the inquisition. That was complete without it ; for the finding of the jury is subscribed by them and by the coroner, but their names no where appear so as to authenticate the writing in question. There is nothing in the circumstance that this writing was found in the clerk's office with, and endorsed upon, the inquisition which entitles it to be read without preliminary evidence.

The first count of the indictment charges the crime to have been committed "of malice aforethought and from a premeditated design to effect the death of the person killed." The court charged that under this count, (the second having been entirely excluded from their consideration,) the jury might convict the prisoner of the offence described in either the first or second subdivisions of the fifth section of the revised statutes. 2 R. S. 657.

Since the decision in the case of *Enoch* by this court, 18 Wendell, 159, no doubt can be entertained, that a common law indictment, charging the offence to have been committed of *malice aforethought*, simple, would be good for either of the offences described in the

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first or second subdivision of the section. Had the indictment in question been so drawn, and without the additional words contained in the statute, “with a premeditated design,” &c. no doubt could be entertained that the charge of the court to the jury would have been correct, and the conviction would have been good under the count. The error in the charge arises from regarding the count as drawn, as equivalent to a count according to the forms used at common law, where the words “of malice aforethought” were used to describe the malice or intent with which the crime was committed. The words malice aforethought, embrace both express and implied malice ; not so of the words, “a premeditated design to take the life of the person killed,” used in the statute. They are not equivalent expressions. The one describes express malice, which Blackstone defines to be “where one, with a sedate deliberate mind and formed design, doth kill another.” 4 *Black. Comm.* 199. The other embraces not only express malice, but also that malice which is to be inferred from the act of killing, but where there is a total absence of a deliberate and formed design to kill the particular individual who came to his death by the act complained of.

Although an indictment at common law would have been good, yet it by no means follows that the count in question is good. I regard the count in this indictment as equivalent in all respects, to one which should charge the murder to have been committed “from a premeditated design to effect the death of the person killed,” following the language of the statute, without the addition of the words “of his malice aforethought.” Such a count would most clearly be good for the offence described in the first subdivision of the statute, and yet it will hardly be pretended that it would support the charge of the judge in this case, and uphold the conviction, for an offence, which so far as I have been able to discover from the evidence, comes entirely within the offence described in the second subdivision of the statute, if it be murder at all. The words “and from a premeditated design to effect the death of the said Peter Fitzpatrick,” used in this indictment, have a restraining and qualifying effect *upon the words “of his [*582] malice aforethought,” which precede them. They limit and control their meaning so as to give to them the effect of describing express malice. I think the error of the court below upon this point arises from their regarding the words “and from a premeditated design” as an interpolation, without any qualifying effect ; and that they might be stricken out without changing the meaning of the indictment.

The principal reason assigned in the case of *Enoch*, for holding the common law indictment good, is that the statute, as far as it goes, simply defined the crime of murder as it existed at common law, and is therefore declaratory. But there is nothing in that case which goes to show that where a specific intent and formed design is charged in the indictment, the prisoner

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can be convicted upon proof, where malice is merely implied from the fact of killing. Indeed the law always requires the allegations in the indictment which are of substance to be proved. In criminal proceedings intent is always of substance. *Chitty* says in his *Cr. law*, vol. 3, p. 1098, on the subject of burglary, if the particular intent be averred, it must be proved as laid. If not, it is fatal. Suppose, at common law, an indictment to charge a murder to have been committed of malice aforethought, and "with a sedate and deliberate mind and formed design to take the life of the person killed," using the language which *Blackstone* used to define express malice, words equivalent to those used in the first subdivision of our statute, could the person thus indicted be convicted of an offence where there was no express malice, no intention to take the life of any particular individual? I think not, for that would be convicting the prisoner of an offence with which he did not stand indicted. You might as well convict a prisoner of the offence of killing B. when he had been indicted for the killing of A. Regarding the first count of the indictment as describing the particular offence which the prisoner was called upon to answer, the court were clearly wrong in directing the jury that they might find him guilty of an offence described in the 2nd subdivision of the statute. It was an offence which [*583] he was not called upon to defend himself against under the first count. And I think this view is clearly borne out by the cases cited on the argument, and particularly by the case of *Regina v. Dean and al.* 4 *Lond. Jurist*, 364, decided in the court of queen's bench, in 1840.

It is possible the conviction might have been upheld in this case, under the second count in the indictment, had not that count been entirely excluded from the consideration of the jury by the court. I am of opinion that the second count was good according to the law laid down in the opinion of Judge Bronson in the case of *Rector*, 19 *Wendell*, 606, where he says, "If a man assault another with intent to do him a bodily injury and death ensues, malice sufficient to constitute murder will be presumed, if the act be of such a nature as plainly and in the ordinary course of events must put the life of the party in jeopardy. This doctrine, he remarks, will be found in every book which treats of the crime of homicide, and it is now a part of our statute law, though expressed in different words." He then cites the language of the 2d subdivision of the fifth section of the revised statutes, as above referred to, as sustaining his position. His remarks were pertinent to the case then under consideration. The killing in that case was by beating an individual with the bar of a door, an unusual and dangerous instrument, with which to beat a man. If the judge's opinion be law, I think the count was good and might have been retained and the case submitted to the jury under it, though the judge's opinion does not exactly square with mine in relation to the construction which should be given to the second subdivision of

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the statute. I had supposed that the circumstances of such a case as is mentioned by the judge, would be evidence of a formed and deliberate design to kill the particular individual who was assaulted and beaten. If one shoot a gun at another, it is evidence of such design. So if he strike with a weapon which would "plainly, and in the ordinary course of events, put the life of the person in jeopardy." The second subdivision of the statute, I think, embraces an entirely different class of cases: as where one shoots "into a crowd, or throws a deadly missile into a throng," [*584] or thrusts about in a crowd with an instrument which he has good reason to believe will produce death to some one he cares not who. Where there is an unlawful beating with an unusual instrument, and the intention to kill is not evident from the circumstances, I suppose the case comes within the 10th or 12th section of the statute, 2 R. S. 661, in relation to *manslaughter*, and would constitute that crime. But whether the count was good or bad, it having been entirely withdrawn from the consideration of the jury, it cannot now, in my opinion, be pressed before the court for the purpose of upholding the conviction. The prisoner was convicted upon the first count under an erroneous charge from the court in relation to the law of the case; and there being great doubt whether, upon the facts he should not have been convicted of manslaughter instead of murder, I cannot consent that this count should be raised up to sustain his conviction.

In relation to the other branch of the judge's charge, in the naked and unqualified manner in which it comes to us, I am of opinion it was calculated to prejudice the prisoner and take from him the advantage of such reasonable doubts as existed in his case. It was certainly in the unqualified manner in which it is spread out upon the bill of exceptions, equivalent to telling the jury that the want of evidence of good character on the part of the prisoner was evidence of positively bad character, and gave the prosecution the advantage of that bad character, which they could not be permitted to show by positive testimony.

On a view of the whole case I think the judgment below should be reversed; and the prisoner remanded for a new trial.

On the question being put, *Shall this judgment be reversed?* All the members of the court, (22 being present,) with the exception of one Senator, voted in the affirmative. Whereupon the judgment of the supreme court was *reversed*, and a new trial ordered.

Albany, December, 1840.—Smith v. Adams.

[*585] *SMITH, *appellant*, and ADAMS, *respondent*.

Where a bill in chancery is dismissed for want of jurisdiction, an order prohibiting the complainant from again litigating the subject matter of the bill will not be made on the ground that it had been passed upon by the chancellor and decided against the complainant.*

APPEAL from chancery. The appellant filed a bill in chancery to obtain an injunction against the diversion of a water course by the respondent. The cause was heard on pleadings and proofs by the VICE CHANCELLOR of the second circuit, who decreed an injunction. On an appeal to the CHANCELLOR, the decree of the vice chancellor was reversed, and the complainant's bill dismissed with costs. But the chancellor added a clause precluding the complainant from again litigating the question whether, previous to the filing of the bill, the defendant had actually diverted the water. See the case, the opinion of the chancellor and the substance of the decree in 6 *Paige*, 435 *et seq.* The complainant appealed to this court. The cause was argued here by

S. Stevens, for the appellant.

M. T. Reynolds, for the respondent.

After advisement, an opinion was delivered by Mr. Justice BRONSON, concurring with the chancellor, that the bill was properly dismissed, but concluding as follows :

" Considering this a most unreasonable litigation on the part of the complainant, and not finding upon the points submitted by his counsel, another question, which was, however, mentioned on the argument, I was at first inclined to the opinion that the decree should be affirmed throughout. But on turning my attention more particularly to the form of the decree,

[*586] I think it requires some modification. "Although the right of the complainant to sue at law is saved, he is precluded from again litigating the question whether there has been any diversion of the water which had been accustomed to flow through his aqueduct. Now, while I agree with the chancellor and the vice chancellor, that the weight of evidence is with the defendant upon that point, and although I would be very willing to conclude the complainant from the further agitation of the question, if I could see the way clear for doing so, I have been unable to discover any principle upon which we can safely arrive at that result. When the bill is dismissed for want of jurisdiction, we, in effect, say to the party, "we will not listen to your complaint—it belongs to another forum—go to the proper court and litigate the matter there." There is an apparent incongruity in dismissing the bill for want of jurisdiction, and at the same time making a

* Decided 24th December, 1840.

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decree which concludes the party as to any portion of the merits of the controversy when he resorts to the proper forum for redress.

The decree does not show on what particular ground the chancellor proceeded ; but as my opinion rests on the ground that the bill should be dismissed for want of jurisdiction, I think the decree of the chancellor should be so modified as not to prejudice the complainant's right to sue at law, for the redress of the injury of which he complains.

The members of the court *unanimously* concurring in the conclusion of Mr. Justice BRONSON, the decree of the chancellor was *modified accordingly*.

*HUMBERT and others, *appellants*, and THE RECTOR, CHURCH- [*587] WARDENS and VESTRYMEN of TRINITY CHURCH in the city of New-York, *respondents*.

The *statute of limitations* may be interposed as a bar to relief *in equity* on a bill filed for the *settlement of boundaries* between adjoining tracts of land alleged to be confused, and praying a discovery, and also for an *account* as between *tenants in common*, the same as it may be insisted on *at law* in an action of *ejectment* or of *account* ; on the principle that where the jurisdiction of the courts is concurrent, time is as absolute a bar in one court as in the other.

Where from the face of the bill, it appears that the *statute of limitations* has attached, and that the complainant has failed to bring himself within any of its exceptions, the defendant may *demur*, and is not bound to *plead* the *statute*.

Even in cases of *exclusive equitable cognizance*, the *statute of limitations* is *generally* permitted to prevail *in equity* as well as *at law*, on the principle of analogy ; but there are exceptions (besides those enumerated in the *statute*,) such as frauds, trusts, &c. in which the court exercises its discretion in permitting the defence.

A naked possession of land, unaccompanied by a *claim of right*, never constitutes a bar, but enures to the benefit of the true owner.

So if a man have title as *tenant in common*, and be in possession, he is *presumed* to hold for himself and his co-tenants ; but such presumption may be rebutted by proof of acts or declarations, indicating an intention to exclude his co-tenants, such as a *disavowal* of his holding as a *tenant in common* ; and if he in fact keeps out his co-tenants, such acts and declarations constitute an *ouster*, and his possession from that time becomes *adverse* within the meaning of the *statute*.

Neither *fraud* in obtaining or continuing the possession or *knowledge* on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner, in not bringing his action within the prescribed period ; nor will his *ignorance* of the injury, until the *statute* has attached, excuse him, though such injury was *fraudulently concealed* by the contrivance of the wrong-doer.

A possession to be *adverse*, must be inconsistent with the title of the complainant who is out of possession ; it must be accompanied with a *claim of title*, exclusive of the rights of all others ; and must be definite, notorious, and continued for the period of 20 years.

Where there is an *actual occupation* of premises, an *oral claim* is sufficient to sustain the defence of *adverse possession* ; it is only where a *constructive adverse possession* is relied upon, that the claim must be founded on *color of title* by deed or other documental semblance of right.*

* Decided 24th December, 1840.

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[*588] *APPEAL from chancery. The appellants, in June, 1834, filed their bill before the vice chancellor of the first circuit, to *settle the boundaries* of certain lands in the city of New-York, owned respectively by the appellants and the respondents, alleged to adjoin each other; and also to *take an account* between them of certain other lands alleged to be held by the parties as *tenants in common*. The appellants state in their bill that *Anneke Jans Bogardus*, their ancestor, being seized of two tracts of land in the city of New-York, one called the *Dominie's Hook*, containing about 130 acres of land, and the other the *Dominie's Bowery*, containing about 62 acres, on or about 29th January, 1662, made her last will and testament, whereby she devised to her children and grandchildren all her real estate, and died in the latter part of the same year; that the appellants are the lineal descendants of *Anneke Jans Bogardus*, and heirs at law in the line of descent from *William Bogardus* and *Sarah Roeloff* or *Roeloffson*, two of the children and devisees of *Anneke Jans Bogardus*, and that there are a large number of persons besides themselves standing in the relation of descendants of *Anneke Jans Bogardus*, who are entitled to shares and portions of the real estate devised by her, but that they are unable to give a complete list or schedule of her living descendants, and that the bill is filed in behalf of themselves and such others of her legal descendants as shall come in and contribute to the expenses of the suit. They then allege, that in November, 1705, the defendants obtained a grant from *Edward Lord Cornbury*, then governor of the province of New-York, of a tract of land in the city of New-York, called successively the *Duke's farm*, the *King's farm* and the *Queen's farm*, and of a certain other tract called the *Queen's garden*; the first being described as bounded *on the east* partly by Broadway, partly by the common and partly by the swamp, and *on the west* by Hudson's river; and the second tract being described as situate on the south side of the church-yard of Trinity Church, and as fronting to Broadway *on the east*, and extending to low water mark upon Hudson's river *on the west*.

They allege that the corporation of Trinity Church, [*589] *at the time of applying for the above grant, were fully aware and knew that the property contained in the grant did not embrace any part of the *Dominie's Hook* and *Dominie's Bowery*, but that in their petition for the grant they *purposely and fraudulently left the northern boundary of the premises to be covered by the grant undescribed and unfixed*, to the end and with the intent to avail themselves of that circumstance afterwards for extending their occupancy, under color of such grant, to other lands not properly included therein, but of which in the circumstances of the times they might be able to obtain some kind of possession, and thus if possible to make title by occupancy and lapse of time against the owners of the lands so to be wrongfully occupied as aforesaid. They charge that any pos-

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session which the corporation may at any period have taken or held of the *Hook* and *Bowery* (except so far as legalized by a certain conveyance obtained by them from one *Cornelius Bogardus*, as afterwards more particularly set out) was taken and held *under color or pretence of Governor Cornbury's grant*, but with *full knowledge* that the same was not thereby authorized. They allege that at the time of Governor Cornbury's grant, the tracts called the *Hook* and *Bowery* were in the actual seizin and possession of the *Bogardus family* or some of them, under claim of full legal title and ownership to every part thereof, and that from that period to about the year 1785, various members of the family were in the actual use and enjoyment of different parts of the property under claim of title to the whole in behalf of themselves and their co-heirs. They then allege, that prior to the revolutionary war, Trinity Church commenced making *encroachments* upon the *Hook* and *Bowery*, by taking possession of portions thereof in pursuance of their original design, and resorted to various means for that purpose, (*particularly alluded to in the opinion of Mr. Justice Cowen, delivered in this cause.*) That this system of aggression was continued until 1785, when the corporation induced one *Cornelius Bogardus*, (who before and since the revolutionary war was in possession of part of the *Bowery*, claiming title to it and the *Hook*, for himself and his co-heirs,) to sell his birth-right in the family *estates for £700, and he accordingly conveyed to the corporation all his individual share in the two tracts called the *Dominie's Hook* and the *Dominie's Bowery*; that on receiving such conveyance, the corporation were let into the general and unrestrained possession of large portions of the *Bogardus lands*, and thereby became seized and possessed of the lands as *tenants in common* with all such rightful heirs and owners thereof, who had not parted with their undivided interests in the same; and in this manner and relation continued to occupy the lands from 1785 until the filing of the bill in 1834. (*For a further detail of the matters set forth in the bill, the opinion of Mr. Justice Cowen is again referred to.*)

To this bill the respondents *demurred*: 1. Because the *parcels* of land, portions of the *Hook* and *Bowery* alleged to be in their possession are not set forth; 2. That the complainants do not set forth the share of the lands to which they claim to be entitled to; 3. That the complainants show no title in equity to call upon the defendants touching the matters set forth in the bill; that it is not pretended that the complainants or their ancestors have been in possession at any time since 1785; 4. That it is not shewn that any *action at law* has been brought by the complainants, or that any impediment exists to such action; 5. That the bill is defective for want of *necessary parties*, apparent from the bill itself; and 6. That the bill does not present a case entitling the complainants to discovery or relief.

The cause was brought to a hearing before the Hon. WILLIAM T. McCOUN,

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vice chancellor of the first circuit, who made an order allowing the demurrer but giving leave to the complainants to amend their bill, by showing what lands claimed by them are in the possession of the defendants; how the complainants are entitled to the same, whether by descent or otherwise, and setting forth their respective shares and interests therein. From this decree the complainants below appealed to the CHANCELLOR, who on the 28th May, 1838, affirmed the decree allowing the demurrer, and dismissed the bill. See the opinion of the chancellor, 7 Paige, 195. From [*591] the decree of *the chancellor, the complainants below appealed to this court, where the cause was argued by

H. G. Warner & G. Wood, for the appellants.

B. F. Butler & D. B. Ogden, for the respondents.

Points on the part of the appellants :

I. The complainants are entitled to relief under two general heads of equity: 1st. To settle and adjust the boundaries which have been fraudulently confused and encroached upon by the defendants, their tenants in common, who own in severalty the adjacent premises, and whose duty it was, as such tenants in common and adjacent owners in severalty, to preserve the boundaries and landmarks distinct. *Rouse v. Barker*, 3 Bro. P. C. 180; *Kiresby v. Farren*, 2 Ves. 414; *Norris v. Leneve*, 3 Atk. 83; *Acton v. Lord Exeter*, 6 Ves. 293; 1 Story's Eq. Juris. 574. 2d. To have an account against the defendants as their tenants in common of rents and profits.

II. It does not appear by the bill, so as to warrant a demurrer, that the complainants' are barred of their claim by lapse of time, because, 1st. They have been tenants in common with the defendants since 1785; and the possession of one tenant in common is in law the possession of the other. 2d. The facts and circumstances set forth in the bill are such as to disavow the presumption of a conveyance from the complainants to the defendants of their undivided interests, or of an ouster and adverse possession, viz.: the circumstances of fraud set forth in the bill; the repeated setting up by the defendants of their title under Bogardus; the legal disability of the defendants to acquire their interest by purchase, and *a fortiori* to acquire them by operation of law. *Livingston v. Peru Iron Co.*, 9 Wendell, 511. *Jackson v. Hendricks*, 7 id. 152. *Jackson v. Frost*, 5 Cowen, 349.

III. The premises claimed are, under the circumstances, sufficiently described in the bill of complaint, because, 1st. The ancient description is fully given, the title being an ancient one. 2d. The reason for not giving a more full description according to their pre-

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sent situation, is sufficiently accounted for; the difficulty being caused by the acts of the defendants themselves, whose duty it was to preserve the landmarks. 3d. Less particularity in pleading is required in equity. *Spurrier v. Fitzgerald*, 6 *Vesey*, 556. *Equity Draftsman*, 323.

IV. The complainants are entitled to a discovery from the defendants of the boundaries of the premises claimed, as incident to the equitable relief they are entitled to, and for the reasons stated in the first and third points.

V. The pedigree of the complainants, connecting them with their ancestor, from whom their ancient title was derived, is sufficiently set forth, because, 1st. Generality of pleading is allowable in stating ancient facts, especially in a court of equity. 2d. The word *heir* involves matters of fact as well as law, and it is sufficient to allege that a party is *sheir* of another, without detailing the circumstances of relationship. 2 *Chit. Plead.* 208. 2 *Saund.* 7, n. 4. 3d. The law of primogeniture did not prevail and govern the descents among the Dutch inhabitants of the colony of New-York, in respect to their inheritances, upon the introduction of the English government or of English law.

VI. An action at law was not necessary in the present case previous to exhibiting the bill.

VII. The parties being very numerous, as alleged in the bill, and having a common right, it is sufficient for some to sue as complainants on behalf of themselves and others.

VIII. Even if it were true that some of the plaintiffs had no title, that is not fatal in a bill of this kind, which the law allows for convenience sake, and will not suffer to be defeated by an objection of misjoinder, only applicable to cases of joint demands.

Points on the part of the respondents :

I. It appears on the face of the bill, that the defendants have been in the exclusive possession of the premises in question from [*593] the year 1785, to the filing of the bill in this cause in June, 1834, being nearly 50 years, claiming them during the whole time as their own. This length of possession is a bar to the claim set up in the bill. *Cases cited by the chancellor, in his opinion in this case*, *Bogardus v. Trinity Church*, 4 *Paige's Ch. R.* 178; *S. C. on appeal*, 15 *Wendell*, 111. *Cholmondeley v. Clinton*, 2 *Jac. & Walk.* 1, 192, *S. C. 1 Turn. & Russ.* 107. *Mitf. Plead.* 4th ed. 107, 108, 163, and cases there cited. *McElwain v. Willie*, 9 *Wendell*, 548, 561. *Hovenden v. Annesly*, 2 *Sch. & Lef.* 636. *Livingston v. Livingston*, 4 *Johns. Ch. R.* 299. *Story's Eq. Plead.* 389.

II. The bill shows no sufficient legal title in the complainants to the lands in question, or any part of them. *Mitf. Plead.* 41, 42, 154, and cases there cited. *Edwards v. Edwards*, 1 *Jacob's R.* 335. *King of Spain v.*

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Marhado, 4 *Russ. R.* 225. *Cliff v. Platelt*, *id.* 242. *Makepeace v. Haythorne*, *id.* 244.

III. The bill is not sufficiently certain and particular as to the lands in possession of the defendants, which the complainants claim, nor as to their respective shares or interests (if any) therein. *Cases above cited.* *Looker v. Rolle*, 3 *Ves. 4.* *Jones v. Jones*, 3 *Meriv. 161.* *Crow v. Tyrrell*, 3 *Mad. 179.* *Moulton v. Smith*, 3 *Ans. 99.*

After advisement, the following opinions were delivered:

By COWEN, J. Both the learned officers who considered this case in the court below agreed that the bill failed to show that any of the complainants, or those under whom they claim, had been in actual possession of the premises in question since 1785. On the contrary, they considered it as admitting possession in the defendants since that time. But they differed as to the character of this possession, the vice chancellor holding that it was not *adverse* within the meaning of the statute of limitations, the chancellor holding that it was.

The bill is in the two fold nature of an action of ejectment and [*594] an action of account. It is brought to settle "boundaries, and to take an account between alleged tenants in common. The legal bar to the action of ejectment is fixed by the statute at twenty years, and to an action of account at six years. The two claims being not exclusively of an equitable character, but capable of enforcement either in a court of law or equity at the election of the complainants, the court of chancery and this court are bound, in passing judgment, to apply the same principles in sustaining the complainants' claims, in allowing bars to their remedy, and receiving answers to avoid or overcome such bars, as would prevail in an action of ejectment or of account itself. The statutes of limitation do not mention (at least, the earlier statutes did not mention) bills in equity as the subject of a bar by lapse of time; but when the statutes came fully to be considered by the court of chancery, they were adopted, and the same operation given to them there, in respect to all legal claims, as if the statutes had expressly mentioned such claims. In all matters wherein the jurisdiction of chancery and the common law courts was concurrent, the statutes of limitation were adopted in chancery, on two grounds, first, on the ground that equity follows the law; and secondly, that where a thing is forbidden by law in one form, it shall not be done in another. It was found in matter of account, for instance, between joint tenants or tenants in common, that the statute limiting the action to six years would be of little avail, if it could be evaded by filing a bill in chancery. In all such cases of concurrent jurisdiction, therefore, which are numerous, the statutes have uniformly, with the exception of a few early and ill considered cases, been received

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implicitly by the court of chancery; and the well settled rule upon authority will allow of their being weakened by exceptions and qualifications to no greater extent than if they had in terms extended to the court of chancery.

So much is premised, without any intention at this stage of the examination to cite authorities in its support. The legal nature of the complainant's claims, and the principles on which I have, so far, supposed they are to be treated,^{*} were insisted upon in argument; some authorities [*595] were mentioned, but none of the doctrine was denied.

With regard to claims of exclusively equitable cognizance, the statutes of limitation are also generally received; but here chancery will sometimes exercise a discretion. The statutes have here been received on principles of analogy; exceptions, therefore, are more freely allowed, and qualifications unknown to the statutes, founded on fraud, trust and a few other grounds, have been considered as admissible.

Another rule, which is one of practice peculiar to the court of chancery, was asserted, and not denied on the argument: it is, that when the bill shows a stale demand on its face, the defendant is not bound, as at law, to plead the statute of limitations; but may set it up by a demurrer. If the complainant mean to avoid the objection in that form by any matter which might be replied in a court of law, he must state such matter in his bill. *Story's Eq. Pl.* § 484, 503. In the case before us, the bill was evidently drawn with that view, and, as in forming my own opinion on this appeal, I have not thought it necessary to go much beyond the principles now mentioned, I intend to do little more than inquire whether the pleader has been successful in showing a claim not barred by the statute of limitations. In doing so, I propose to take the bill in that aspect which looks to the settlement of boundaries. If it be barred in this aspect, the claim for an account falls with it. If not, there remains, such a tenancy in common that the defendants would be liable to account for the rents and profits to the extent of at least six years before the bill was filed.

The complainants insist that the facts stated in their bill make out a subsisting tenancy in common, between them and the defendants; that the latter have worked a confusion of boundaries between the *Duke's farm*, which is their own land holden in severalty, and the common land of both parties, which are the *Dominie's Hook* and *Dominie's Bowery*, and of which the defendants have been for many years in the possession and enjoyment, receiving the rents. The complainants insist that the title to different parts of the latter, and a common possession, were acquired by the parties ^{*}to this suit respectively from *Anneke Jans Bogardus*, in a course of devise, descent or purchase, since 1668, which course I shall assume has been traced with sufficient particularity and certainty; and adopting that aspect of the case, independent-

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ly of any matter of defence, the complainants would be clearly entitled to an account, and also, I apprehend, to a decree settling boundaries. The bill would make out the possession by the defendants of adjoining lands, one parcel being their own in severalty, and the other in common between both parties; and the confusion charged upon the latter, whether arising from fraud or negligence, was a breach of trust, warranting the interposition of a court of equity, however improper for such a court might be the ordinary conflict of boundaries between owners in severalty. I see no objection, therefore, to the principle of the bill in either aspect; and I do not stop to inquire whether the relative titles or possessions have been deduced or defined with the requisite certainty.

One answer set up by the defendants is, that, admitting the bill to be sufficiently formal in its allegations of title and possession, yet such a character is given to their possession as to take away the supposed relation of tenants in common—indeed to show that it never existed; but that, whatever possession was acquired by them was decidedly *adverse*, and continued for a length of time exceeding twenty years, next before the filing of the bill. If this be so, on the facts stated by it, most clearly there is an end of this controversy.

By demurring, the defendants have admitted all the material facts stated in the bill, and all the legitimate conclusions of law deducible from those facts. We must, therefore, at this stage of the cause, receive the complainants as their own historians. We must treat their history as absolutely authentic, absolutely true, and incapable of qualification by looking into any matters of fact, however well known or verified by proceedings in other causes.

In testing a defence founded on possession, courts of justice direct their attention to the time during which it has continued, and its character. [*597] The latter respects its notoriety, *the nature of the occupation, and especially, the intention with which it is taken and continued. If it be a naked possession, not accompanied with any claim of right, it will never constitute a bar, but will enure to the advantage of the real owner. It is a possession in his right and for his benefit. The law presumes, till the contrary be shown, that a man in possession without title intends to hold for the true owner; in other words, that he intends to hold honestly so far as he can consistently with holding at all. So if he have a title as tenant in common, he is presumed to hold for himself and his co-tenants; and in either case, if his possession be in fact wrongful, in other words, adverse or exclusive, so as to work a statute bar, he must show this in a course of proof, or show that it is admitted by his adversary, in pleading. In the case before us the question turns on admissions in pleading; and I apprehend may be taken as narrowed down to the simple one of what char-

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acter we are to ascribe to the defendants' possession from time to time as it was taken by them, in respect to its being adverse or not. That the defendants have been actually possessed of very considerable portions of the land in dispute, for a long time, and from a period prior to 1705, I shall leave to a simple review of the bill, after reminding the court, that no dispute seemed to exist between the learned counsel who argued this cause, that it was sufficiently ancient, distinct and definite, to satisfy the statute of limitations in time, in precision and in notoriety. But when we came in other respects to the character of the possession, viz. whether it was consistent with the claim of the complainants as tenants in common, or adverse, they differed widely, the counsel for the complainants insisting on the former, and the counsel for the defendants on the latter. So far as the statute of limitations may be concerned, this is the only issue we are called on to decide.

Have the defendants then uniformly, continuously, definitely and notori-ously been in possession *adversely* to the complainants, for a period of twenty years before the bill was filed? Another form of putting the question is with what intent, *quo animo*, in the legal phrase, have the defen-dants accompanied their possession; and has that *quo animo* [*598] been indicated by acts calculated to exclude the complainants from all participation as tenants in common?

In 1705, the defendants obtained a grant of the *Duke's farm*, on their own petition. The bill states that they artfully presented to the government, in their petition, such a description of the farm as left the northern bound-ary ambiguous. This northern boundary was the dividing line between the Duke's farm and the land of the complainants, and should have been so ac-curately marked and described as to render the separation entirely obvious to the adjoining proprietors. But it is said the defendants had already form-ed the intention to possess themselves of the *Bogardus lands* as being part of the *Duke's farm*, and had introduced the ambiguity in order to subserve that intention. Not being definitely limited on the north, this circumstance opened the door for pretending that their grant of the Duke's farm com-pre-hended the Bogardus lands; and it was for the fraudulent purpose of fol-lowing out such pretension by actual encroachments, that they had sought to procure the equivocal grant. It is said they succeeded in imposing upon the government, and that their purpose soon after became quite manifest by their conduct. Taking up the story, at this stage, more nearly in the lan-guage of the bill, we are told that but a small part of the Bogardus lands were improved or enclosed. That the defendants proceeded to act on their original policy, by making considerable encroachments prior to the American revolution. Their course was to take such possessions from time to time as they believed would eventually ripen into a title. In this way they made a variety of lodgments, though resisted by the Bogardus heirs. The defend-

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ants persevered, with intent to deprive those heirs of their birthright. Many of them were constrained to abandon their possessions by the defendants' habitual use of menaces, the frequent exercise of actual violence, such as pulling down fences and improvements, burning them riotously, threatening suits and imprisonment, and occasionally resorting to the temptation of pecuniary offers. They boasted of their wealth and power, and declared that [*599] they would never desist from their purpose of getting full possession. "In this way, the more timid occupants were induced either to quit their possessions, or to take title under the defendants.

This brings us to the year 1785, down to which time, notwithstanding the disadvantages under which the Bogardus heirs labored, several among them, including one *Cornelius Bogardus*, kept possession of large portions of their land, claiming title for themselves and their co-heirs. The bill characterizes these encroachments at every step as wrongful, the defendants being fully aware that they were acting illegally, and having in view their original design. So far there is no dispute that they proceeded with an adverse claim of title, and took such a possession as would have constituted a bar by the statute of limitations, had it continued for twenty years, and not been qualified with the imputed *scienter* of wrong and fraud.

This brings us to the deed from *Cornelius Bogardus* to the defendants, which is much relied on as changing the relation of the parties from that of enemies to friends—from that of adverse holders to tenants in common. Cornelius was a common proprietor of the land in dispute, and stood foremost among those descendants of *Anneke Jans Bogardas*, who had sturdily opposed the encroachments. He (says the bill) had tenants, and divers portions in fence, and was therefore a prominent object of persecution for years, both before and after the American revolution. His fences were prostrated in the night and burnt by numerous parties of men acting for the church, and who turned in their cattle and devoured his crops. Thus he suffered long and severely; and being poor, was successfully assailed with an offer of £700, in consideration of which he granted and conveyed to the defendants, who claim that their title under such grant is good and valid. He giving way, the defendants were let into the general and unrestrained possession of large portions of the land. The bill charges that the defendants offered the £700 by way of purchasing Cornelius' birth-right: and that taking the deed and being let into possession, they by this means became seized and possessed as tenants in common, and in this manner and relation they continued to occupy till the filing of the bill in 1834, inasmuch as no subsequent event or occurrences happened to change in that respect the character of their possession.

The allegation, however, almost immediately follows, that the defendants'

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conduct has since been such in regard to that deed as to indicate the unfairness of their original design. That they have been cautious in its exhibition, refused to record it, and generally kept it in profound secrecy, affecting even to doubt its existence, fearing that the heirs might claim it as an admission of a tenancy in common. In truth, the great reason for obtaining the deed was a pending proceeding before the legislature to question their title. They therefore obtained and exhibited it to the legislature as covering a part of the Duke's farm—in other words, their own farm. That excepting this and the production of the deed in 1807, in defending themselves against a claim by some of the *Bogardus heirs*, they have uniformly concealed the deed, and affected to hold the lands as if none had been received.

This part of the bill calls for more particular attention, because it is relied upon as containing averments, that the defendants, by the act of taking various possessions under the deed became tenants in common, and that they have since continued to hold as such. Therefore it seeks to infer that the adverse character of their possession was taken away. I am not disposed to deny, that had these averments stood alone, although they are not direct, yet they might be received as of the import contended for. The allegations are, that by means of the deed from, and possession under Cornelius, the defendants became tenants in common, and had held to this day in that relation. True all this is obviously stated as an inference from the naked act of taking possession under the deed, without showing what sort of a deed it was. It might on its face have negatived all idea of conveying Cornelius' common right. But perhaps the presumption would be, that both parties were dealing, and intended to deal in his undivided share as a tenant in common. That inference standing unrebutted, would, I should think, be about equivalent to an independent averment that "the defendants had taken and held as tenants in common with the Bogardus heirs, from the year 1785. But taken with its surrounding circumstances, the acts and intents which preceded and followed the deed, it seems to me that the inferential allegation is completely overcome. From the year 1705, down to the date of the deed, the defendants had entertained the settled design, coeval with their petition for a grant of the Duke's farm, to claim the Bogardus lands in severalty as a part of their grant. They had prosecuted that design through the instrumentality of threats, of persecution, of riotous invasion and on some occasions in a spirit of vandal ferocity. A part of their system when these failed, was a resort to pecuniary appliances. They bought out the more obstinate inhabitants, for the very purpose of acquiring and extending adverse possession in pursuance of their general design. With Cornelius among others, they had utterly failed of success by the more hostile means of incursion. They therefore bargained with him to

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leave the land, taking some sort of conveyance. But the bill alleges that so far from any intent to come in as tenants in common, it was for the very purpose of exhibiting it to the legislature as covering a portion of the land contained *in their own grant* from the crown. They generally concealed it among their private archives; and it is not said, that even when, on one occasion, they produced it in defence of an action, they claimed under it as passing a right in common. They feared that if seen, the Bogardus heirs might seek to infer that they held in common; and finally we are told that, with the two exceptions mentioned, they have uniformly concealed the deed, and affected to hold the lands in question as if none had been received. Nay, one of those very instances which are insisted on as exceptions, was an adverse claim addressed to the legislature, and the other is in itself entirely equivocal. It would be a strained and unnatural construction to suppose that in either case, they meant to admit the claim of the Bogardus heirs.

Now although a man who may hold possession rightfully as a tenant in common, presumptively refers himself to that right, yet the contrary [*602] may be shown; and if his conduct be such as to satisfy the mind that he means to hold out his co-tenants, and he does in fact exclude them, this is an ouster: and his possession from that time becomes adverse within the meaning of the statute of limitations, equally so as if he had never any right to claim as tenant in common. It by no means follows, therefore, that even had the deed from Cornelius expressly mentioned his right as a tenant in common, the defendants were necessarily tied up to hold in that relation. They might at any moment break the connection, by openly disavowing it; and from that time the statute of limitations would begin to run. Can there be any doubt in this case, on what is stated by the bill, that the defendants have done more; that they have not merely broken a connection in common, but that it never existed in fact; that they always intended to claim the land in question as their own without conceding the right of participation to any other? I should think the bill leaves no room for doubt. But even should the court be of opinion that the bill has, in the mode of stating the case, left the matter equal between the parties, the rule of construction comes against the complainants, that ambiguity in the language of their pleader shall be turned against them.

The year 1785 seems to have witnessed the final reduction of the disputed territory. When Cornelius and his tenants gave way, the contest became hopeless. At any rate the bill charges no new and distinct act of taking possession after that year, so that all the land in dispute must be taken to have been held and claimed in severalty for nearly fifty years.

But the bill seems to have been drawn on the assumption that in proportion as the defendants' encroachments were committed under a *conscious-*

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ness that they were depriving the Bogardus heirs of their birth-right, and in proportion as the defendants were, therefore, put to sinister expedients in the prosecution of their design, their claim to protection under the statute of limitations is weakened. The bill abounds with imputations of their knowledge that they wanted even a color of right; and every step is referred to their preconcerted design of 1705: the design of claiming the Bogardus lands as a part of their own. In this way it [*603] cannot be denied that the bill makes out a case of strong moral transgression; and the question thus raised is, whether a plaintiff, lying by and forbearing to bring his action till after the time in the statute of limitations shall have run against him, can excuse his negligence by the fact that the defendant knew all along he was in the wrong. If the statute is to become unavailing on the ground that the wrongdoer knows he has been withholding an acknowledged right, it is obvious that it can very rarely be used as a protection; and the forms of pleading have been entirely mistaken for centuries. It will no longer be sufficient, even in *assumpsit*, simply to deny that the defendant promised or that the action accrued within six years. The plea should be that he has honestly withheld the debt; or at least the plaintiff may reply that the defendant withheld it under a consciousness that the delay was wrongful; and the issue will thus always be joined upon his integrity. So an action of *trespass* could never be barred by the lapse of six years, unless the defendant could show the trespass to have been innocent. But it is entirely obvious that none of the statutes of limitation proceed upon such ground. Whatever the character of the injury, and whether committed in good or bad faith, the statute bases itself upon time. The civil remedy is cut off in two, four, six, twenty or twenty-five years, except it be impeded by certain specified disabilities, such as infancy, coverture, &c. In like manner public prosecutions even for very black crimes are barred by the lapse of three years. The statutes limiting the right of entry into land and the right of action for real estate, speak the same language and must be construed by the same rules. If the claimant have not been in possession actually or constructively within twenty years, he loses the right to his ejectment. The 2 R. S. 221, 2d ed. § 5 declares, that "no action for the recovery of any lands, &c. or the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action." The only exceptions are mentioned in § 16. If any person *entitled to commence any action, &c. be at the time the title descended or accrued within the age of twenty-one years insane, imprisoned or a married woman, such person may sue within ten years after the disability shall have ceased. These disabilities can no more be multiplied at law or in equity, when a legal right

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comes into question, than they can in an action of slander or assault and battery. Possession by the defendant with a claim of title for twenty years, can no more be answered by averring that he knew he was wrong, than could the bar of two years, in slander, by the known falsehood of the libel for which it is prosecuted. So long as a man is in possession of land claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession in a constructive as well as an actual sense. It is of the nature of the statute of limitations when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy. To warrant its application in ejectment, the books require *color of title*, by deed or other documentary semblance of right in the defendant, only when the defence is founded on a *constructive adverse possession*. But neither a deed nor any equivalent muniment is necessary, where the possession is indicated by *actual occupation*, and *any other evidence of an adverse claim exists*. The muniment is but one circumstance by which to make out an adverse possession. An *oral claim* of exclusive title or any other circumstances by which the absolute owner of land is distinguished from the naked possessor are equally admissible, and may be equally satisfactory. It was very properly conceded, on the argument of this cause, by the counsel for the appellants, that a claim of title, even under a paper altogether void and inoperative as a deed, will yet characterize a possession as adverse within the statute of limitations.

Nor can it be received as an objection, that the possession and claim of title are by the agents or tenants of a *corporation* incapable [*605] by law of taking lands.* It is said that the "law will not do an idle thing; that by its own operation, it will not cast a title upon one not competent to take as a purchaser, any more than it will carry land by descent to an alien. The answer was properly given at the bar, that the argument confounds the acquisition of title with the cutting off a remedy. The plaintiff is barred of his action because he has been shut out of possession by an adverse claimant for 20 years. We need only look into the bill before us to see that a corporation, though wanting the legal authority to purchase, has yet the power of actual ouster in an eminent degree, and of actually enjoying land for 20 years, several times told, claiming in fee, and excluding the real owner. Of such an owner, possession within twenty

* It was stated in the bill, that by the act of incorporation of Trinity Church, the income of the church arising from lands was limited to £500, and it was charged that in 1804, and since, the income of the church from lands was more than five times that sum, and it was insisted that in such a state of things it was impossible for the corporation to acquire farther estates than were granted to them in 1705, either by *operation of law*, or *otherwise*, until their legal capacity for such acquisition should be enlarged. It is in respect to this portion of the bill, and the arguments founded upon it, that the judge speaks in this part of the opinion delivered by him.

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years can no more be predicated than if the wrongful claimant had been a natural person. The remedy is therefore gone. Admit that the law will cast no title on the corporation, the answer, in the words of the statute, is equally fatal : " You have been out of possession for more than twenty years, and are thus disqualified to maintain an action to recover your land against me or any other."

But the complainants say that they and those under whom they claim, remained ignorant of their wrongs until within two years before their bill was filed. I think they show that this is highly improbable ; not to say impossible. It is incompatible with the facts that the resistance of their predecessors was coeval with the open encroachments of the defendants, and that both were continued, so that the defendants never held their possession quietly for twenty years together, till after 1785. It is enough, however, to say that ignorance of a plaintiff's wrong, is not among the disabilities enumerated by the statute of limitations, nor has it, when considered in the abstract, ever been regarded either at law or in equity, as coming within the principle of *the enumeration. The question was [*606] recently considered by the court of king's bench, in *Granger v. George*, 5 *Barn. & Cres.* 149, 7 *Dowl. & Ryl.* 729, *S. C.*, and the very point of ignorance ruled against the plaintiff. How it would be regarded on a merely equitable claim, may be inferred from what was said by Sir Thomas Plumer, in *Cholmondeley v. Clinton*, 2 *Jac. & Walk.* 139, 142. He denies that it could be listened to at law, and infers that it is equally inadmissible in equity.

This ignorance, however, is not suffered to stand in the abstract. Another ground taken by the bill is, that the system of wrongful intrusion imputed to the defendants, was concocted and pursued with a *fraudulent intent* ; and it is averred that their scheme was so secret and conducted with so much art for a period of one hundred and thirty years, that none of the Bogardus heirs discovered the original design till within a very short time previous to the filing of the bill. But the answer comes again : the complainants are before us for the purpose of enforcing a legal claim. The statute has told us in so many words what alone will save the right of entry or action against the lapse of the twenty years. These are infancy, coveture, and other disabilities or impediments expressly named. Still other impediments may have been equally worthy of enumeration ; and that the defendant committed the wrong with a secret and impenetrable design to avail himself of the statute of limitations, and succeeded in covering up his fraud till the time had expired, may have been one of them. But the reasons are obvious, and authorities quite uniform against going beyond the express enumeration in the statute. Among other qualifications sought to be engrafted upon it, *fraud* has been expressly repudiated by several cases. The

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question has been before the supreme court in three successive instances. The first was in *Troup v. Smith's Ex'rs*, 20 Johns. R. 33. The case was decided in 1822. After a full argument, presenting the English and American authorities up to that time, Chief Justice Spencer went over them, and concluded the unanimous opinion of the court in these words:

[*607] “ We wish to be understood as deciding the cause *on the ground, that whether there was a fraudulent concealment or not, so as to prevent the plaintiff's discovering the fraud until within six years before the commencement of this suit, sitting as a court of law and bound by the express provisions of the statute, we could not notice the fraud so as to take the case out of the statute.” The same point was again resolved by the same court in 1830, *Leonard v. Pitney*, 5 Wendell, 30. And still again in 1837, *Allen v. Mille*, 17 id. 202. All these were cases where the injury was committed fraudulently, and kept so veiled that no remedy could be had till the statute had run. In the two first cases the mischief was not even felt till after the six years had elapsed. All the cases were fully argued and much considered by the supreme court, who united in sustaining the rule laid down by Chief Justice Spencer in the first. The last case repeats and adopts his very words. The same thing was held in *Callis v. Waddy*, 2 Munf. 511, and *Hamilton v. Shepperd*, 3 Murph. 115.

Thus stands the matter at law. I will not go over the cases cited by the learned chancellor to this point, which I perceive relate to questions not directly cognizable at law, but which are more properly such as are dealt with on equitable grounds. I will merely cite a passage or two from what Lord Redesdale said in *Cholmondeley v. Clinton*, after that cause had reached the house of lords. It is reported in the 4th of *Bligh's Parl. Cas. (old series)* 1 to 125. At p. 119, Lord Redesdale speaks of the statute limiting an ejectment to twenty years. He says: “ I take it to be a positive law which ought to bind all courts; and, for that reason, I have taken the liberty in another place, to say that I considered it not simply a rule adopted by courts of equity by analogy to what had been done in courts of law under the statute, but that it was a proceeding in obedience to the statute, and that the framers of that statute must have meant that courts of equity should adopt that rule of proceeding.” This, it appears to me, is substantially giving up the right to qualify the statute by cases not provided in itself, even while we stand

exclusively on equitable ground. It is not necessary to go so [*608] far here, where the “right in question is in every sense the same as if we were engaged in an action of ejectment or account. Here we must be governed by law and nothing but the law; and we have seen what that is. To other proofs that we are bound by the law, although sitting in a court of equity on this very question of fraud, may be added the remarks of a learned judge in our neighboring state of North Carolina.

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The question before the court was, whether the statute ran against an undetected fraud in the sale of a land warrant ; and the supposed rule of equity had been pressed upon the court. Henderson, J. replied that this rule related to a pure equity only, neither an action on the case nor the subject matter of such an action. He adds : “ But if it were on a subject matter cognizable at law, and within the cases provided for in the act of limitations, that act is as positive a bar in a court of equity as in a court of law.” *Hamilton v. Shepperd*, 3 *Murph.* 115, 118. Again, in *Bell v. Beeman*, *id.* 273, 278, he says, “ Equity follows the law, and the rights of the parties shall be the same in both courts. They shall not be changed by the complainant’s choosing his forum.”

Such is the settled rule in respect to the shorter statutes of limitation. If a replication of fraud and concealment will not be received even there, as an answer to the delay, there is still less reason for allowing it to overcome the defence of adverse possession ; for, however secret the design which led to it, one essential quality of such a possession is, in general distinctness and notoriety. At any rate such was the possession imputed to the defendants. To this may be added the greater lapse of time during which an adverse possession must continue in order to constitute a bar. An actual ouster and levying a fine would have barred the complainants in five years. And no one can doubt that a prosecution of the like design by open and notorious possessions for nearly half a century, some of which were obtained by riots and conflagration, would as effectually put owners upon their guard, as a fine with proclamations ; yet the latter, at the time when these contested possessions were taken, would have worked a final bar after the lapse of five years only. Such continued to be the law till abolished [*609] by the revised statutes of 1830. 2 *R. S.* 265, 2d ed. § 24. Nor did those statutes cut off the wrongful holder of land from the right to limitation equally summary in another mode. They substituted the more fair and just method of a notice, to litigate which if not obeyed within a very short time by any one claiming title, and having the notice served upon him, comes with all the force of direct *res judicata*, and estops him forever. 2 *R. S.* 238, 2d ed. pt. 3, ch. 5, tit. 2. 3 *id. appendix*, p. 706, note of revisers.

I mention these things to show with how much anxiety the law extends its protection over the actual occupant. Statutes limiting real actions generally operate in favor of the men who cultivate the soil, or inhabit the dwelling houses of the country ; and cannot discriminate between the rich and the poor, the powerful and the weak, the wise and the ignorant. Looking at their tendency to encourage men not only in the pursuits of agriculture, but every great interest of the nation, an argument of policy arises for their equal and steady application, even more strong than of statutes which passed

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to limit personal actions. All, however, were framed on the most salutary principles of general policy. They have, with great propriety, been termed statutes of repose. They fix a term broadly marked and easy of proof, at which litigation is arrested; beyond which every man is enabled to pronounce that his possessions are no longer open to disturbance. The great object, no doubt, was to interpose the presumption arising from delay against the loss of evidence and the fictions of perjury; but in this view alone neither open wrong nor established fraud could be admitted as an exception without striking at the principle itself; neither can be received without proof, and that would bring back the very danger which the statutes were intended to obviate. An admission of the fraud in the course of pleading, as in the case at bar, forms no exception. A man circulates a secret slander, by which his neighbor, after the lapse of two years, for the first time finds his character to have been ruined.

[*610] The secrecy was "for the fraudulent purpose of evading the statute limit of the two years. He sues. The slanderer pleads the statute; and the plaintiff replies the fraudulent concealment, and his consequent ignorance of the injury. No lawyer would doubt that the defendant might demur, thereby admitting the fraud. He has but one of two courses; if he be driven from his demurrer, he must take issue on the fraud, and put the plaintiff to his proof. So in the case at bar, and in every case, by such a circle of pleading, if allowed, the defendant is exposed to that very danger from fabricated evidence against which it was the great purpose of the statute to protect him. I have drawn an illustration from a very short statute, because it is evident, that the policy becomes more obvious in proportion as the lapse of time is enlarged. The magnitude of the danger may be heightened by the value to which the property at stake has arisen, the multitude of excited claimants, clamorous of their supposed wrongs, diligent in searching for means of attack and detecting flaws in the defence. In the very case before us, the protection of the statute is sought to be withdrawn from the defendants, on the ground that they committed a fraud some four full generations before the bill was filed. We are asked to throw both parties back upon the litigation of a documentary title which looks for its origin to the Dutch dynasty before the year 1668; and which claims to have reached the complainants mainly in a course of descent from that time. This, it is conceded, must be done, if at all, not merely through evidence obscured by the ordinary mists of tradition in a settled government, and under a well regulated system of conveyancing; but evidence which comes to us through the mutations of empire, the fury of revolutions, repeated changes in the law of descents, in the law of common assurances, and great defects at all times in the method of perpetuating the evidence of their existence.

There is no case either in England or this state, wherein *fraud* has been re-

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ceived as an answer to any statute of limitation, when the statute was interposed against a mere legal claim. *Livingston v. The Peru Iron Company*,⁹ *Wendell*, 511, is the only case relied on as containing an [*611] intimation that it may be received for such a purpose ; and that was a case in which the statute of limitations was *not* in question. The defendant claimed to be in adverse possession of land under a deed from John Livingston ; and denied, therefore, that while such possession continued, Livingston could convey the land to the complainant. The defendant had no actual possession of a single foot of the land, and his deed was shown to be void for two reasons : first, because the agent of John Livingston had no power to give it ; and secondly, because, if he had, it was obtained fraudulently. Savage, Ch. J. and this court held therefore, that no such constructive adverse possession in the defendant had been made out as disqualified Livingston to part with his title. In other words, a void deed would not raise a constructive adverse possession within the meaning of the statute concerning champerty and maintenance. The transaction was recent, and the possession founded not upon actual occupation, but solely on a deed which was shown to be void. The statute of maintenance has come to be considered with a good deal of disfavor. In the previous case of *Jackson, ex dem, Hendricks, v. Andrews*, 7 *Wendell*, 152, even actual possession claiming under a void deed was denied to be adverse for the purpose of disqualifying the real owner to convey, though clearly since the decision of this court in *La Frombois v. Jackson, ex dem. Smith*, 8 *Cowen*, 589, that would not be so of a deed invoked to make out a possession within the statute of limitations. *For this purpose*, I understand that case to hold it good, in so many words, although void both in respect to a want of title in the grantor and on its face. In short, if the right be claimed under a void deed, it is not therefore less available than a claim *without deed*, which is yet admitted to be a bar. The question is on the *quo animo* ; the intent ; not, I take it, as was suggested in *Livingston v. The Peru Iron Company*, the intent to claim honestly ; but the intent to claim at all, right or wrong, with or without knowledge that another has title. The statute in terms bars the man who has been out of possession for twenty years, and no one is the less out of "possession, [*612] because the man who is in may know that his possession is tortious. After such a length of time it would be dangerous to open an inquiry upon the *bona fides* of the defendant's claim. No English or American case was cited as allowing any such inquiry, and there are some which expressly deny it. It has been denied in North Carolina where the limitation is only seven years. *Den, ex dem. Reddick, v. Leggat*, 3 *Murph.* 539. In that case the defendant, as the plaintiff alleged, had fraudulently obtained a grant from the state, which he knew covered a

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part of the plaintiff's previous grant ; and held seven years' possession under it. The jury were charged at nisi prius, that no paper writing founded in fraud could operate as color of title in favor of him who was party to the fraud ; and the question of such fraud was left to them on the evidence. They finding for the plaintiff, a new trial was granted. The court remarked that the act of limitation which had passed in 1715 was general, and not confined to possessors who were ignorant of any other title ; and the judge delivering their opinion adds, " I would say that the law so construed is politic and wise. On the one hand it may be said that no *mala fide* possessor should acquire a right, no matter how long his possession may have continued. Yet, as parol evidence must be gone into for the purpose of proving the *mala fides*, and it being a thing dependent on knowledge in the possessor, a thing which may be drawn upon him by perjury without a possibility of contradiction, the object of passing the act would be frustrated. It would tend to render titles insecure. For us as expounders of the law, it is sufficient to say that there is no such exception in the words of the act." The ideas thus put forward are not new. They were advanced in the case of *Stovel v. Lord Zouch, Plowd. Comm.* 371, in the reign of Queen Elizabeth, and this is moreover a case which shows with how much strictness even a short statute of limitations in favor of possession should be confined to the words of saving or exception. A statute had declared that a fine should operate as a bar to *all* strangers, saving to all persons and their heirs such right as they had, so that they pursued it by action or entry within five years [*613] *next after proclamations made. It was held that not even *infants* or *femes covert* were excepted, but all limited to the five years, because the statute did not except them in words. It is added, " Whosoever considers that this act was made for the general tranquillity and quiet of inheritances throughout the realm, which are more to be favored than the non-age of an infant in a case which rarely happens, will not think this a hard or rigid construction ; and although sometimes a case happens for which there is no remedy, yet that does by no means impeach the reasonableness or justice of the law, seeing the great number of people who are provided for by it." It is then shown that there might be several successive infancies, and added, " Then the right would come to be tried when it is out of the memory of any man living, and yet in such a dark case a jury would be under the necessity of giving a verdict ; and such darkness and ignorance would be the means of introducing perjury and many other mischiefs which the makers of the act intended to prevent by removing the cause of them, viz. by limiting a certain time, which they did not intend should be exceeded, although some particular persons might suffer by it." See also *Maddock v. Bond*, 1 *Irish T. R.* 332, 340. Even while treating of an equity, when *Cholmondeley v.*

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Clinton came to a second hearing at the rolls, 2 *Jac. & Walk.* 155, Sir Thomas Plumer seems to have used language equally strong. He says (speaking of a bar in 20 years by adverse possession,) “The question is never a question as to the title belonging to the plaintiff or defendant; time shuts out the inquiry into the title, except only to ascertain that the possession has been *de facto* adverse to the claimant; whether amounting strictly to a disseisen, abatement or intrusion, is of no consequence provided it has been adverse, that is, *inconsistent with the title of the claimant*. The defendant in possession has a right to stand on the defensive, and throw upon the plaintiff the burthen of getting over the preliminary plea in bar by showing a title to sue, that is, by proving that he has made his entry or filed his bill within twenty years. The question respects the plaintiff’s right to the remedy, not the defendant’s title to the estate. A tortious act can never be the foundation of a legal, any more than of an [*614] equitable title. It is no more favored by a court of law than a court of equity, considered nakedly by itself; but the statute bar arises from other principles, admitting the title if it could be inquired into, to be clearly in favor of the plaintiff and against the defendant, still the question is whether he has prosecuted that title in time. The quiet and repose of the kingdom, the mischief arising from stale demands, the laches and neglect of the rightful holder, and all the other principles of public policy take away the remedy notwithstanding the title *veri domini*, and the tortious holding of the possessor. To advert to the merits is to shift the question from the real subject of inquiry. The case never arrives at that point; it is stopped *in limine*, equally in the courts of equity as of law. The title is changed in both by the operation of a public law, upon public principles without regard to the original private right. If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title to recover. The defendant keeps possession without the possibility of being ever disturbed by any one.” We need scarcely go beyond this case to collect the doctrine of adverse possession, as to its nature and effect upon equitable estates. It was twice at the rolls, first before Sir Wm. Grant, 2 *Meriv.* 171, who held there could be no adverse possession of a merely equitable estate. *Id.* 357. This was in 1817. It came on again upon the equity reserved before Sir Thomas Plumer, in 1820, 2 *Jac. & Walk.* 1. He differed from Sir William Grant, and turned the whole cause against the complainant, on the ground that there was an equitable adverse possession. He mentioned the great importance of the question. “One of greater importance,” he said, “hardly ever arose in any cause. It is one on which every estate in the kingdom does or may depend. Among other things he adverted to the rule at law. He said, that at law, “the lapse of twenty years affords a substantive insuperable plea in bar. It is the

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fixed limit to the remedy; the *tempus constitutum*. One [*615] day beyond is as much too late as one hundred years. "This is the peremptory inflexible rule at law, fixed by positive statutes, if there has been adverse possession *and no disability or fraud*. No plea of poverty, ignorance or mistake can be of any avail. However clear and indisputable the title if the merits could be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such *possession* and the *time* preclude all investigation of the title. The door of justice is closed. The claimant cannot be heard to show his title. It is a decisive answer to him that he comes too late. That alone is the bar. His title remains, but he has lost his remedy. The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicæ ut sit finis litium*, is a favorite and universal maxim. The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which, the possessor may know that his title and right cannot be called in question. It is better that the negligent owner who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harrassed by stale demands after the witnesses of the facts are dead, and the evidence of title lost." 2 *Jac. & Walk.* 139, 140. The reasoning and the decision in this case were adverted to and approved by the supreme court of the United States, in *Elmendorf v. Taylor*, 10 *Wheat.* 174. The decree in *Cholmondeley v. Clinton* being enrolled, the complainant appealed to the house of lords, where the cause was decided and the decree affirmed, in 1821. A sketch of the decision in that house is given by a note at the close of the report in 2 *Jac. and Walk.* 189. The full report occupies the whole of the first part of 4 *Bligh's Parl. Cas. old series*. The case was heard throughout on pleadings and proofs, was fully argued in every stage, and elaborate opinions were delivered by very able judges. It may well be inferred, therefore, that the doctrine which finally prevailed was well considered in all its relations. The complainant in that cause had also [*616] "brought an ejectment, and filed his bill for a discovery in aid of that action. To that the defendant demurred, on the ground that, by the complainant's own showing, his remedy was barred. So the lord chancellor held. This was in 1823, and the case is reported in *Turn. and Rus.* 107, 118. At the last page, the lord chancellor adverted to the decision in the house of lords, saying, "I believe it was the intention of the house of lords to state this: that where there has been adverse possession, not accounted for by any disability, as coverture or infancy, for twenty years, a court of equity ought not to interfere."

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I advert to this case the more particularly because I think the argument of Sir Thomas Plumer, which finally prevailed, gives a more just and clear view of the general policy of the statute, and the nature of adverse possession, than any other. One remark I have already cited, in respect to what possession is adverse. Whether it be a disseisin, abatement or intrusion, he says, is of no consequence provided it has been adverse, that is, *inconsistent with the title of the claimant who is out of possession.* It is inconsistency, or such a claim as puts the plaintiff at defiance, no matter how wrongful, or with what degree of known wrong in the possessor, as will be seen in many parts of his opinion. The whole burthen of the argument goes on a claim of title inconsistent with that of the plaintiff, irrespective of the question whether it be wrongful or rightful, with or without color of title, honest or dishonest. After being, in fact, out of possession for twenty years, it is too late to inquire of any fact beyond such possession except the disabilities mentioned in the statute. It is true that he mentions *fraud* as an additional disability even when speaking of the rule at law, and that is again mentioned without disapprobation when he is cited by the supreme court of the United States. I have already had occasion to notice three successive cases decided by the supreme court of this state, in which that has been repudiated; and I will make a single remark to show why Sir Thomas Plumer stated the exception, and why it cannot be received here unless this court are prepared to overrule what was held by the *supreme [*617] court. The exception, no doubt, referred to the mere dictum of Lord Mansfield in *Bree v. Holbeck, Doug.* 654. The action was assumpsit, to which the defendant pleaded the statute of limitations. The plaintiff replied stating certain facts which he insisted made out a fraud and fraudulent concealment of the cause of action by the defendant. On demurrer, the court overruled the replication, Lord Mansfield remarking that the replication did not make out a fraud; and adding that, if one had been made out, the case would have been very different. That dictum has been overruled expressly every time the question has been before the supreme court. They have considered themselves bound by the enumeration of disabilities in the statute. In the very last case, *Allen v. Mille*, Chief Justice Nelson says, "Some of the judges in England, in late cases, have intimated an opinion that a fraudulent concealment by the defendant would take the case out of the statute, even at law as well as in equity; but we are not aware of any decision upon the point. The intimation is founded upon the dictum of Lord Mansfield in *Bree v. Holbeck*, which Chief Justice Spencer, in *Troup v. Smith*, refused to acknowledge as an authority."

I trust I have already said enough to show that this strictness is not founded on any favor to the man who may be supposed to have committed a fraud, and kept it out of view till the statute shall have run against the injury. It

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is the impossibility of deciding after a certain time whether any fraud has been committed or not. In respect to a fraud of yesterday, the transaction may be so shrouded that the keenest vision cannot determine its character. The fraud must be left to inference from circumstances, and there is always some danger of mistake against innocence. After the lapse of many years this is peculiarly so; and the statute of limitations, therefore, interposes a bar to the accusation, as it does of all crimes except murder and treason. Standing on a *pure equity*, I am aware that the contrary has been put very strongly. Story, J. said in *Prevost v. Gratz*, 6 *Wheat.* 497, “In a case where fraud is imputed and proved, length of time ought not, up [*618] on principles of *eternal justice, to be admitted to repel relief.

On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practised is rather an aggravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief.” But he immediately adds the best of all reasons, I think, why, on a question of *legal right*, the inquiry should be cut off after the statute has run. His words are, “But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty real or apparent with which it may be encumbered.” And the court denied relief on these grounds.

Take an illustration of the remarks of Judge Story from the case at bar. The complainants insist on the defendants taking issue and going into proof on the question, whether the corporation had presented a petition in 1705, by which they fraudulently set forth certain boundaries in an obscure way, with the intent to favor the pretence of a right to encroach on their neighbors. No human being has been alive for several generations who could speak to that question. The court or jury who are to try it must then make a guess in the best way they can, whether the boundaries were stated honestly. The defendants say “we have been in adverse possession for nearly fifty years, of the whole land in dispute; and we decline going into the question, so long as a possession is a bar to all inquiry.” And can there be a doubt, on looking at the statute, and the reason of the thing, that adverse possession was intended to bar an inquiry as well into questions of fraud in acquiring a title as any other? Suppose some document to exist on which the complainants may ask a jury to infer fraud, would it not be most unreasonable to require this, when all living testimony to reveal it must long since have ceased to exist? Why should “not

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the statute bar inquiry and cut off the complainants' documental evidence of one kind as well as another?

I am not aware that there can be any pretence of effectual concealment in any thing else. The defendants, in the language of Sir Thomas Plumer, have *de facto* been in possession, claiming a title inconsistent with any in the complainants. The latter have been *de facto*, out of possession, and this appears to have been so with regard to them and those under whom they claim since 1785, nearly fifty years before their bill was filed. Even if both parties should be looked on as tenants in common when the Bogardus deed was obtained, the adverse possession since would be equally fatal; though I think it entirely clear that the bill shows not only an exclusive possession in fact, but that such possession was always adverse.

Being entirely satisfied, therefore, with the ground taken by his honor the chancellor, I have not deemed it necessary to discuss the questions of form upon which the case turned when it was before the vice chancellor. In my view of the case, on the complainants' own showing, there should be an end of this litigation.

I am of opinion that the decree of the chancellor should be affirmed, on the ground that the complainants' claim is barred by the statute of limitations.

By Senator FURMAN. It is admitted if there be a strong equity in favor of the defendants, they cannot be required to condemn themselves or expose their title to the searching questions of a bill of this nature; and that such is also the case where the equities are balanced between the parties. But the complainants here claim that they have a superior equity, or in their own words, a triple equity, based—first, on the allegation of confused boundaries; second, on the claim for an account; and third, on the charge of fraud.

On the first ground, the allegation of confused boundaries, I have examined thoroughly the complainants' bill, and upon carefully reading the description of the first tract of land of 130 acres claimed by that bill, and described as the "Dominie's Hook," on a creek or inlet called Messpats kill, in the "city of New-York, I have come to the conclusion that it is much more than doubtful whether that tract was ever in the city and county of New-York; and I am the more strongly impressed with that doubt, from the fact that from all the examinations and inquiries which I have made, I cannot discover that there ever was any creek or kill of that name on Manhattan Island. Neither Benson in his Memoir on Ancient Names, Moulton in his View of New-Orange, now New-York, in 1678, or Watson in his Olden Time in New-York, mention it, although they describe all the shores, creeks, inlets, hills and valleys known upon that

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island. But I do find there was a Messpats kill on Long Island, in Newtown, and that in the same town was a farm called the Bowery, which did anciently belong to the ministers of the Dutch Reformed Church of New-York, and was applied among other things to the support of their poor. This Messpats kill is described by that name in the Newtown purchase, under the Dutch government, bearing date the 12th day of April, 1656, and in Gov. Nicoll's patent of Newtown, under the English government, dated March 6, 1666, and in the year 1665 we have a conveyance of a farm at Messpats kill on Long Island, with a habitation and a tobacco house; and the term *Bowery* was not then or at any period used to designate any particular place, except in the single instance of the street in New-York city, but simply meant a farm; and so there was Corlear's Bowery, Stuyvesant's Bowery, and many others; and the same term was also applied to farms at Schenectady. Another reason which induced me thus critically to examine the description of that first tract of land, was that from a perusal of the bill I discovered a plain and apparent error, in fact upon its first page, where it is stated, that in the year 1663, Anneke Jans Bogardus was, in the words of the complainants, then "of the village of Beverwyck in New Nederland, so called, a place now within the city and county of New-York;" whereas Beverwyck was never within the city and county of New-York, but was one of the names by which Albany was then distinguished. The next piece of land claimed by the bill, being sixty-two acres, is described as [*621] "lying on the south side of the "house to the fence of the land belonging to the company," meaning the Dutch West India Company, and which the complainants locate at Warren street in the city of New-York, and extending therefrom northwardly. In order to ascertain whether there be in reality any such confusion of boundaries, we must in the first place ascertain, if possible, where this land of the company, or the *King's farm*, as it was afterwards called, was located.

It would be impossible at this distant period to locate accurately by tradition the boundaries of that farm; no two persons would place it within the same lines by many hundred feet; and in fact no two writers or historians have ever as yet agreed in their description of it. One, I recollect, states that the company's farm extended to the present Duane street; another locates it between Liberty and Cortlandt streets, and the complainants define its northern boundary to be at Warren street. Under the Dutch administration all the rear of the town beyond the walls was cast into farms said to have been six in number, called bouwerys. Van Twiller, the governor, occupied number one, on which was his mansion, and he had his tobacco plantation on number two. This No. 1, which was the company's farm, (and with No. 2 afterwards known as the King's farm,) extended from Wall street to Hudson street. No. 2 was next beyond that, north. No. 3 was at

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Greenwich. No. 4 was on the plain of Manhattan, including the park or commons to the dock. All these farms originally belonged to the government, and most of them probably remained public property long after the period designated by the claimants as the time of the acquisition of their title.

There being no dependence to be placed on the recollections of individuals in such matters, as every person must have experienced who has been obliged to test the accuracy of such information, the only remaining evidence on which we can with certainty rely are the ancient maps made about that time. And we fortunately have such evidence existing in the map of the city of New-York made by James Lyne, in the year 1729, which shews that there was no street beyond Broadway westward, and that the land on the western side of that street descended to the beach ; and that [*622] from Cortlandt street northward all the ground west of Broadway was occupied by trees and tillage, and called "*The King's farm.*" One of the boundaries of this farm being said to be partly by a swamp, if that swamp can be shown to have been far to the northeast of the spot where the complainants locate the northerly boundary of the farm at Warren street, it would seem to settle the question in the minds of most reasonable persons. In the year 1775, Broadway, in the vicinity of what is now Grand street, was known as the New Road, and about the site of Grand street was then a swamp, and it was by marching a detachment of the American army along the edge of this swamp to the woods which were then near Richmond Hill, and then through the Greenwich road in the following year, 1776, that they were saved from what was then esteemed almost inevitable destruction. This historical fact is cited for the purpose of showing the locality of that swamp, and taken in connection with the other facts, will prove that the *King's farm* granted to the defendants legitimately covered the premises now claimed by the complainants.

And on the other hand, if we should apply the conflicting descriptions of this farm as given in the various instances to which I have referred, to the fact that the city of New-York, when the grant to the defendants was made, extended to Cortlandt street, in one instance you will see the farm entirely merged in the city, and nothing left for the legislature to grant, and in the other instances the King's farm would have been scarcely large enough for a garden in that day, which was not the case, for it was a large and important tract of land, and was granted to the defendants at that period because they had charge of the temporalities of a church to which the government looked for the propagation of christianity throughout this extensive country. If these things be true, and there can scarcely be a reasonable doubt of them, these complainants have been greatly mistaken in setting up their claims to these lands in the manner they have done ; and that there cannot be any confusion of boundaries as they claim by their bill.

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[*623] *As to the claim for an *account*, in the view which I have taken of the first ground of equity, it cannot possibly exist. It is shewn by the complainants' bill that the defendants went into possession of the King's Farm in the year 1705, under a grant from the colonial governor; that under color of that grant they came into possession of the premises in question, and public documents now existing show that there is strong reason to believe that about the period of that grant those premises were understood to constitute a part of that farm. Does not this create a strong equity in favor of the defendants, or at least an equal equity with the complainants? and therefore this bill cannot be sustained upon the principles before stated.

It may be said that strictly speaking such an examination as I have given the facts in this case is not within the scope of an opinion upon this state of the pleadings—that may be so—but in a case of such great moment, one involved in the immense expense which has attended and will attend this litigation, I have deemed it my duty to lay before the parties interested such views as I have entertained of those facts, hoping it may be attended with beneficial consequences.

As to the third ground, the charge of *fraud*, as I intend to examine that in connection with the ground of defence set up under the statute of limitations, I shall leave it for the present.

Teller, one of the complainants, derives his descent from the daughter of Sarah Roeloff; and in order to get rid of the effect of a misjoinder of parties complainant having interest, with those having none, which it is charged is fatal in a bill of this kind, it is insisted that the daughter of Sarah Roeloff died when the Dutch law was in full force, and that her children all equally inherited. Whereas on the other side it is alleged that she died under the English law, and the descent was therefore liable to the law of primogeniture.

The vice chancellor of the first circuit holds that the English common law was, as a matter of course, introduced into this colony immediately after the conquest of 1664; and in that I am inclined to think he is right, [*624] notwithstanding *the provision in the articles of capitulation as to the Dutch customs of inheritances. But it is not necessary to contend for that point here; it is sufficient for all the purposes of this decision that the English law was established here in the year 1674. The Dutch recaptured the colony in 1673, which act of itself put an end to and extinguished all the privileges and reservations in the articles of capitulation of August, 1664; and they retained it until October 31, 1674, when they ceded it to the English in exchange for Surinam. The first English governor after this cession, Sir Edward Andros, on the 9th of November following, issued his proclamation, declaring "that the known book of laws formerly established and in force under his royal highness' government is now

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again confirmed by his royal highness, the which are to be observed and practised," &c. What was the meaning and intent of this proclamation is evident from the acts which followed its promulgation. Accordingly in the city of New-York, at a term of the mayor's court held March 13, 1674-5, proclamation was made of the governor's order that all persons intending to continue under the English government should come in at the ringing of the bell on the next Monday, to take the oaths of allegiance and fidelity. On the day mentioned, Cornelius Stenwyck, William Beeckman, Nicholas Bayard, Johannes De Piester, and divers others appeared and demanded a confirmation of their former privileges granted them by Gov. Nicolls, who signed the articles of capitulation. The president requested to know what they were. They answered, "1. To have the liberty of the church. 2. That their people shall not be prest. 3. That the article of inheritances be confirmed. 4. That they shall not be obliged to take up arms against their own nation." All which they requested the court to inform the governor of, previous to taking the oaths, (being the same privileges as to the Dutch inheritances reserved by the articles of 1664.) The governor's answer was— "That without condition, articles or provisoes, they must take the oaths, otherwise to stand to the censure and penalty in the laws set forth. And at five meetings of the court subsequently, 314 citizens took the oaths required.

"There has been considerable anxiety manifested in the course [*625] of this argument, to show that there were no colonial laws previous to the enactments of 1691, or that they were of such a loose and vague description as to merit no attention; and that even those had probably been lost or destroyed; and for that purpose, 2 *Graham's History of the United States*, 225, and *Smith's History of New-York*, 4to. 124, have been cited. It is really strange how such matters get into histories, and pass from one age to another without contradiction. The truth is that those laws of the colony of New-York enacted in the years 1683, 84 and 85, are generally as well worthy of attention as any which have been passed since, but never having been printed, the public know little or nothing about them; and they are all now preserved in the office of the secretary of state. But it would be well probably if those laws could be discredited in this case for they show clearly that the English common law was established in this colony immediately after its cession by the Dutch in 1674, if not previously. Thus we find by the charter of liberties enacted in 1683, it is provided that every freeholder shall have a vote in the election of representatives to the general assembly, and the article concludes in the following language: "By freeholders is understood every one who is so understood according to the laws of England." The same charter also declares, "That from henceforward no lands within this province shall be esteemed or accounted as a chattel or personal

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estate, but an estate of inheritance, according to the customs and practice of his Majesty's realme of England." To show that they meant the same should be conveyed as lands were in England, they also by the same instrument enact—"that no estate of a feme covert shall be sold or conveyed, but by deed acknowledged by her in some court of record, the woman being secretly examined if she doth it freely without the threats or compulsion of her husband."

This does not look as if the law was vague and indefinite, and to use the words of one of the authorities cited, shew there was any difficulty in knowing what the law was.

[*626] "But this is not all the proof which exists from our public records and laws, which show that the English common law was adopted in this colony as early at least as I contend for, if the Dutch law ever existed, and was recognized after August, 1664. During the same session the legislature, October 29, 1683, passed "An act to settle courts of Justice," by which they established a "high court of chancery"—"to hear and determine all matters in equity"—and a common law court, occupying the position of our present supreme court, with "power and jurisdiction to hear, try and determine all matters, causes and cases, capital, criminal or civil, and causes tryable at common law." It is further shown that the English common law was so established in this colony, and that for that reason the colonial legislature deemed it necessary on the same day on which they passed the above law establishing those courts of equity and law, to enact "An act for regulating former mortgages," the object of which was to confirm some mortgages which had been given according to the Dutch mode of conveyancing, provided they should be foreclosed or renewed within eighteen months. And in the preamble of this act they recite—that "it hath been the custom and practice of the ancient inhabitants of this province commonly called Dutch, to use and exercise the methods of their own nation in mortgages of lands, houses and tenements, *which is not according to the usage and method of England, and the now established laws of this province.*"

It has been urged by the counsel for the complainants that there were now existing many estates held under the Dutch conveyances made many years subsequent to the articles of capitulation, which conveyances were bad at the common law, and that therefore the inference was irresistible that the Dutch law continued in force for a long series of years subsequent to the capitulation of the year 1664. That such conveyances were made, there is not any doubt, and it is equally clear, that they were bad at common law, but the inference so sought to be drawn, does not arise, and is rebutted by the facts now existing, as shewn by the statute last above cited in relation to the Dutch mortgages; and also from the fact that the

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colonial legislature "from time to time enacted laws for the purpose of confirming the estates said to be created under those conveyances, which would not have been necessary, if it was true that the Dutch law existed in force as thus claimed. So by the "Act of settlement," passed November 2d, 1683, they confirmed the titles of all persons who had been in the actual possession of lands for four years prior to the passage of that law; reserving the right of "all persons under age, feme covert, *non compos mentis*, imprisoned, or beyond the seas"—thus again showing most clearly, that in all matters relating to estates, they were governed by the common law, and not by the civil law as established under the Dutch government; and they required this act of settlement to be published and proclaimed at the town house in each town in the province, three several days within four months after its passage. And so the very instance cited by the counsel of the devise of the manor of Fordham to the Dutch reformed church in New-York, proves my position; for if it had been good under the Dutch law, and that law had been in force when the devise was made, it would not have been necessary to obtain its confirmation from the colonial legislature, in the year 1755.

The same legislature also in the same year, 1683, by "An act to prevent frauds in conveying lands," and by "An act to prevent deceit and forgery," adopted the English common law in relation to conveying and livery of seisin; and they also at the same time declared that the same should not "include the former deeds, mortgages or conveyances, but leave them in the same condition as they were before the passage of the act." Our ancient statutes and public records thus teem with evidence tending to show that the common law of England was the law of the land in this colony from the year 1674; and the reason why so little is said on that point in the statutes subsequent to the year 1691, is that it was regarded as settled by previous enactments. If this was not the fact, the various courts of the province, and among them those of the highest judicial authority, must have existed for many years without any legal basis; a supposition too absurd to be entertained for one moment. That historians who [*628] have written since the period of our revolutionary contest, or even those who framed their works some sixty or seventy years after those enactments, should have fallen into the error of supposing those statutes had no existence, or were lost, is not so very strange, when we are informed that none of the statutes of this colony prior to the year 1691 were ever printed, with the exception of one or two single acts; and that but three complete manuscript copies of those statutes have ever existed, one of which was preserved in the office of the secretary of state, now in the city of Albany; another in the office of the clerk or register in Kings county, where it still remains, although not now, from its great age, in an entirely perfect state;

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and the third copy was in the clerk's office at Southampton, in Suffolk county. Indeed, so little has the attention of the public been called to this curious and valuable body of laws, that one historian, the Hon. Mr. Wood, in the earlier edition of his history of Long Island, asserted that no legislature sat in this colony between the year 1684 and 1691, and was not convinced of his error until some original acts were shown which had been passed at the session of 1685, and he was undoubtedly as firmly convinced that he was correct in his assertion, as ever Mr. Graham or Mr. Smith could have been as to the truth of their allegations that those laws were vague and indefinite, or had been lost or destroyed.

This settles the question, that when the daughter of Sarah Roeloff died, her estate descended under the English common law; and therefore the complainant Teller cannot in the manner in which his descent has been traced, have any title to these lands, admitting for argument sake that they belonged to the complainant's ancestor. And he having no interest therin, has no right to file this bill against the defendants, and the same should be dismissed. Teller having been joined with the other complainants in prosecuting this as one undivided claim, it is in my judgment fatal to the whole bill. It is true, there is a strong distinction between joint demands and several demands,

and that this distinction has been recognized in the federal courts [*629] of the United States. But it is only where such demands may be

disjoined and distinctly appear as to amount and extent, that may be regarded as separate or several demands, so as to authorize the bill to be dismissed as to such of the complainants who have no title, and to be held good as to others; and not in a case like the present, where the amount and extent of the interest nowhere appears upon the face of the pleadings, but on the contrary is shewn to be an undivided, indefinite interest, and one which in all human probability never could be ascertained, even by years of labor. A general demurrer to the whole bill has been repeatedly held good, where a party having an interest joins with him as a complainant, another having no interest, if the fact appears upon the face of the pleading, as it does in this instance.

As another ground for sustaining this bill and the claim founded upon it, it is urged that the corporation of Trinity Church was under a disability to acquire title to these premises, they having *at that time* the full amount of revenue allowed by the act of 1704. And to show this, the complainants set forth that act, which declares that the property to be acquired by that corporation shall not exceed the yearly rent of £500; and they then allege that in the subsequent year, 1705, the colonial legislature granted to that corporation the Duke's farm, or as it was also called, the King's farm, at the annual rent of 3s. This provision, if confined as the bill seems to claim, to the value of £500 as it then existed, there is nothing to show that these de-

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fendants ever did at any time acquire any real estate which was, at the time of its acquisition, above the yearly rent of £500—for I presume no one will contend that upon such a limitation, an estate fairly within it at the time of acquisition will become divested by a subsequent rise in its value. Such an unreasonable view of the case cannot be pretended by any one who has given it the least thought. If it should, however, be so contended, then the £500 of the year 1704, is not the £500 of the year 1840, as all must know who have given the subject the least examination, for the decrease in the value of money, and the increase in the value of grain and other commodities have greatly changed "the real amount of that [*630] restriction. Such is the principle upon which the fellowships in many of the colleges in England, are retained at this day, although in terms vacated by their corporation statutes made some century or two previous, upon the incumbent obtaining an estate or perpetual pension of the yearly value of £5. This principle is advocated and sustained in a work of great authority and learning, entitled the "Chronicon Preciosum," by Bishcp Fleetwood; published in 8vo. London, in the year 1745. In this view of the case the objection is without foundation. But there is another aspect in which it may be regarded, which is equally fatal. This restriction is a mere question of governmental policy, and individuals, as such, have nothing to do with it, and no control over it; and the utmost that can be said of it is, that the title of the corporation is perfectly good as to the whole world even if it should exceed that restriction in its annual rents, and it is not for that reason void, but only *voidable* at the instance of the supreme power. In my opinion, however, even this is a strained view of the case. I do not even believe it to be voidable—the estate must at the time of its acquisition be of a greater yearly income than the amount of the restriction to give that restriction vitality. And the fact that an estate should many years afterwards accidentally, by building a city upon it, or for any other cause, acquire a greater value, will never authorize the application of that restrictive principle.

I have now disposed of all the material questions arising in this case except that of the *statute of limitations*—the application of which forms one of the most important points to be decided.

The complainants show, upon the face of their bill, that these defendants have been in the exclusive possession of the premises which they now claim for more than forty years, previous to the commencement of the present suit; and they do not set forth any excuse sufficient at law or in equity to take their case out of the general rule, that a suit will be barred by lapse of time unless commenced within twenty years after the complainant's right of action accrues. *It is true they do not set this forth in express terms, [*631] but they do say that before the revolution this corporation obtained possession under claim of the grant of the king's farm, and with the in-

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tent to deprive the Bogardus heirs of their estate ; and that they have continued in the possession thereof, and in the actual receipts of the rents and profits ever since. If this does not constitute an *adverse possession*, that is, a possession inconsistent with any title in the complainants, I must confess that I would find it difficult ever to comprehend the meaning and extent of that term. The complainants do, it is true, make many and various allegations connected with this admitted possession. In one of which, after describing certain alleged wrongs and trespasses, they charge, “ and in this way a variety of lodgments were from time to time made by the said corporation in the more accessible and exposed parts of the Bogardus lands, particularly the *Bowery lands* aforesaid, which lay to the south of Messpats kill, and not far distant from the northerly extremity of the King’s farm.” From what I have previously said in relation to this farm bounded upon Messpats kill, it must be evident to most persons that this bill has been carefully drawn, not so much with a reference to what can be proved in the case, as to make out a *prima facie* claim which would compel the defendants to exhibit and set forth their title deeds and documents, and thus enable the complainants to avail themselves of any weak point which they might discover in them, from carelessness in the mode of preparing papers at that distant period, or from the loss or destruction of some connecting links in the chain of documentary evidence during so many ages as have elapsed since this title was originally granted to these defendants ; and it also serves to shade the aspect of that long catalogue of wrongs and grievances elaborately portrayed in the complainants’ bill.

All those charges of tearing down fences, and forcible ejectments, are entirely matters of inducement, and not facts important to the decision of this cause ; for, suppose them all true, unless the complainants could establish a clear and good title to the premises in question, they could [*632] not sustain their action by reason of those matters, let them be alleged in however strong language. And further, if their title to the premises was not good, all these ejectments and dispossessions were no more than they deserved for trespassing upon the lands which did not belong to them—which shows conclusively that such matters can only be stated by way of inducement. These complainants can have no good title if the law presumes against it, or if the law presumes such title to be in another person. So a receipt for twenty years of rent issuing out of land is on the common principle *prima facie* evidence of title. *Matthews on Presumptive Evid.* 310. On the like principle a non-payment for a long period of a rent charged upon land, will operate as a presumptive bar to the grantee of the rent. *Ibid.* 311. In this case it appears upon the face of the pleadings that the defendants have been in the receipt of the rents of these premises for about half a century ; and that the complainants have been out of the

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possession of the premises, and out of the receipt of the rents for the same period ; and nothing appears, that I can see, from a careful examination of the bill, which can bar the presumptions which thus arise from that state of facts.

The complainants, however, endeavor to get over the plain and obvious provisions of the statute of limitations, by engrafting upon it an exception which it does not contain : that those claiming such title must, in addition to their possession, *know* it to be honest, and their original entry must be made in *good faith*. If this doctrine be sustained, the result will be, that in all trials of ejectment where the title of the defendant is sought to be sustained on a long and quiet possession, it will not be the title which will be tried, but the *good faith* with which the entry upon the land was made, probably a century or more ago, a fact which it would be impossible to show in nine cases out of every ten. It would enable any person, without having the least shadow of title, to harass and perplex with a long and costly litigation, the owners of lands and estates which have been in their families for many ages, by filing bills against them containing allegations of *fraud* in the original entry. It can never be that such is law in this state, or [*633] in any other community where the rights of individuals in person and estate are protected. If parties have legal claims to property, they should settle their controversies before time has drawn its veil over all the transactions connected with it ; before the witnesses who could testify as to the truth of the facts thus alleged are all departed to their long account ; and before the documents and written evidences which would explain and make clear many things now in doubt and obscurity, are destroyed or lost. If they wait until after all this has taken place, they cannot reasonably expect that any court will give an extra liberal construction to the statute of limitations for the purpose of letting in their claim. They must, for the sake and preservation of their own rights and their own property, and that of the whole community, which would be jeopardized by the establishment of a different rule, look for an application of that statute in its plain and clear interpretation to their case.

I can see no good reason for sustaining this claim, either upon the facts or the law of the case as set forth by the complainants themselves ; and I am therefore in favor of affirming the decree of the chancellor.

By Senator LEE. The decree should be affirmed, for the reasons and on the grounds assigned by the chancellor.

It appears on the face of the bill, that the complainants' claim is barred by lapse of time, as the defendants are admitted to have been in exclusive possession, exercising acts of ownership, as selling, leasing, &c. since 1785 ;

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and it is not averred that any ancestors of the complainant have been in possession since that period.

But the bill is drawn with a view to take the case out of the operation of the statute of limitations, and defeat the defence of adverse possession by the charge of *fraudulent intent* in obtaining the original grant and in taking possession. Without examining here how far *fraud* in the inception of an adverse possession invalidates it, or how far the decision of this [*634] court in *Livingston v. Peru Iron Company* "is to be regarded as establishing that doctrine, I think that the facts set forth do not warrant the application of that rule in any shape. The charge seems to be that of *fraudulent intent*—morally bad indeed, but not embodied or exhibited in any fraudulent act, instrument or deed. It is therefore wholly intangible. The grant to the church is not questioned; it is confessedly good, whether its boundaries include the contested lands or not. There is no fraudulent *act* charged, such as to vitiate an instrument or deed. The distinction between a fraudulent or illegal *act*, and an *intent or affection of the mind*, not susceptible of proof, is well established in *Van Ness v. Hamilton*, 19 Johns. R. 372, where Chief Justice Spencer says, "Instead of a trial of fact, the inquiry would be as to the secret operations of the mind and thought," which the court held to be a bad allegation. See to the same purpose the opinion of Mr. Justice Sutherland, in *The People v. Manhattan Company*, 9 Wendell, 377. Here the bill states that the property is claimed by the defendants under color of the purchase and of the patent from Governor Cornbury; or, as it is said in another place, they claim that the lands are within the scope of that instrument or patent.

The buying out and receiving a conveyance from one of the heirs against whom the church had long claimed title, and over whose possession they had exercised, or claimed and attempted to exercise acts of ownership, afford no legal presumption of abandonment of prior title. The church has had an exclusive adverse possession since 1785, on the shewing of the bill; and it there also appears to have commenced under claim of title from the Cornbury patent, a title wholly adverse to that under which the complainants claim.

I cannot see how the question of original title can now be opened, without overthrowing the known conservative policy of our law as to limitation of real actions, and the possession of real estate, as well as disregarding the express provisions of our present and former statutes on these heads. Such a precedent would open the flood-gate to litigation, and shake the security of titles to large tracts, in our older counties, where it is well known [*635] that owing to ancient prejudices "against recording, and other circumstances, large numbers of freeholders have no other evidence

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of title, than ancient and hitherto undisputed possession in themselves and their ancestors.

I do not think that the case is affected by the general doctrine claimed to be asserted in *Livingston v. Peru Iron Company*, 9 *Wendell*, 515, that possession commencing under a fraudulent or void deed cannot be considered as adverse. Yet lest that decision be supposed so apply here, I would remark, that we ought to distinguish between the reasoning of Chief Justice Savage and the decision of the court, a majority of whom voted with him. The chief justice applies the rule to all possessions claiming to be adverse, whether to bar a recovery or to make void a conveyance by the true owner while out of possession. The case before the court involved only the latter point, and the two questions do not stand on the same ground, nor does the decision of one necessarily dispose of the other. Our revised statutes, in re-enacting the rule of law which had already been established, judicially, declare, "that every grant of land shall be absolutely void, if at the time of the delivery thereof such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." 1 *R. S.* 739 The decision of the court in the case referred to is claimed as establishing the principle, that a deed fraudulently obtained from the owner, or otherwise voidable by him, does not enable the grantee to claim a title adverse to the true owner so as to invalidate a second conveyance, but that the first being voidable, the second is good, though from a grantor out of possession. But as to possessory titles acquired by lapse of time, the rule previously settled by judicial exposition is thus fixed by legislative enactment: "Whenever the occupant, or those under whom he claims, entered into possession of any premises, under claim of title exclusive of other right, founding such claim upon some written instrument as being a conveyance of the premises in question, and there has been continued occupation and possession of the premises under such claim for twenty years, the premises shall be deemed to be held adversely." 2 *R. S.* 294. Here the fact [*636] of the claim being founded upon some written instrument, coupled with twenty years' possession, is all that is required in order that "the premises shall be deemed to be held adversely." The question whether the original adverse possession commenced under a valid deed is not to be inquired into, as perhaps it could be under the construction attempted to be given to the decision in *Livingston v. The Peru Iron Company*, were it an adverse possession to bar a subsequent deed given by the true owner out of possession, and before any possessory title had accrued by lapse of time.

I have hitherto considered the case of *Livingston v. The Peru Iron Company*, as others seem to view it, as establishing the principle, that a deed fraudulently obtained is not available as the foundation of an adverse

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possession. For myself I find nothing in that decision warranting that conclusion, and I humbly conceive it settles no such principle, and establishes no such rule. I shall therefore examine it something more at large.

The chancellor had in that case decided that the deed to Murray under which the defendant claimed to derive title, was fraudulently obtained and was voidable on account thereof, but not void; and that the possession under it, there being a subsisting deed, was adverse; and that in consequence thereof the legal title to the premises in question did not pass to the complainant, H. R. Livingston by the deed executed to him by his father, while such premises were thus adversely held and occupied under such voidable deed. I nowhere find in the opinion of the chief justice, that a deed obtained by fraud is thereby rendered void; nor that a possession held under a voidable deed may not be adverse. The positions urged by the chief justice as the foundation of the conclusions to which he arrives in that opinion, are, 1st., that to render a conveyance by the true owner void as to the person claiming by possession, that person must have possession at the time of the execution of such conveyance, and that such possession must be adverse to such owner; that when the person claiming to hold by possession has no

written evidence of title, but claims by parol to be the owner, [*637] there must be actual occupancy *a pedis possessio*, a "substantial enclosure by fence, sufficient for the protection of the crops, and it must be marked by definite boundaries, and that there was in that case no such adverse possession and none within any of the acknowledged principles on that subject; that there was nothing like an adverse possession independent of the deed, &c.; and, 2d. that where the possession is claimed to be under a *paper title*, it must be a subsisting and not a void deed, and that such deed must describe the premises claimed to be so held adversely. But he admits that it is not necessary that such deed should be a valid one, or should convey a valid title. He says that it is urged that a deed *voidable* only must be avoided by special pleading. This he does not controvert, but admits, in answering thereto, when the deed is void, the plea is *non est factum*; and that the deed in that case under which the defendant claimed to hold adversely was not merely voidable, but was absolutely void; a nullity and no need. He says a deed under seal cannot be executed by an attorney without authority under seal; that the deed in that case was executed by the Sperrys as the attorneys of John Livingston, and that they had no authority from him to execute it; that they had no authority other than a letter from Livingston directing them to *contract* with Palmer for the sale of the premises to him, and this letter containing the directions was obtained by fraud and was therefore void; and that even from the authority thus obtained, the Sperrys entirely departed by executing a full covenant deed of the premises not to Palmer but to Murray. He therefore insists that the deed

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thus executed was not the deed of John Livingston, but was utterly void, an entire nullity, and that any pretended entry under it was an entry without any deed. To show that that decision was confined to this one principle, that the deed was void, and not merely voidable, he adds, "It may be said that if the deed is void, then the remedy at law is complete, and a resort to a court of equity was unnecessary." To that objection he says, it is a sufficient answer that the point was not raised nor discussed in the court below, and besides the bill seeks a discovery. These seem to me to be the conclusions of Chief Justice Savage in that case with whom the court concurred in opinion. I therefore look in vain for any authority in that case for the principle insisted on, that an adverse possession cannot be set up on a possession obtained under a deed procured with a fraudulent intent, or by acts and representations actually fraudulent. [*638]

I further consider it important for the peace and security of titles to uphold the decision of the *vice chancellor* as to one point, i. e., that the manner of acquiring the complainants' titles, the term and extent, not of property, but of estate, should be made to appear, before the defendants can be called upon to answer. The claimants have not deduced a *prima facie* title. For the ordinary period of two or three generations, and until 1786, the law of primogeniture and the preference of the male line prevailed, whatever may have been the earlier law of the colony during the Dutch government, and immediately after the cession. The claimants state that they are "heirs with others," but that is to say no more than that they have a legal claim. In a bill of discovery, the obligation is imposed upon the complainants to make out a *prima facie* title in themselves, before they can call upon the party in possession to disclose his title. The complainants in this case have not made out such presumptive title by descent. They have not shewn how they are heirs. It does not appear whether they claim through the elder line, or whether when they claim through daughters, there was no male line entitled to preference in the order of descent. These are facts within the probable knowledge of the complainants, and essential to be set forth.

I am therefore for affirming the decree.

By Senator LIVINGSTON. It appears that Trinity Church has been in possession of the lands, now claimed by the applicants, certainly ever since the year one thousand seven hundred and eighty-five.

The legislature of this state, in order to quiet old possessions, and render secure the peaceable occupation of lands to persons who had become purchasers, or obtained by inheritance lawfully, and without fraud, as respects themselves, and believing it to be the interest of the people of this state that claims which had lain dormant for a great length [*639] of time, should not be brought up to turn men out of the posses-

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sion of their lands, and thereby keep open an everlasting door for constant and continued litigation, productive only in many cases of no other result excepting ill will and expense to all the parties, passed a statute limiting the time in which actions to recover lands in this state should be brought; and although this act may not strictly apply to a court of equity, yet that court will, I think, in most, if not in every case, follow the law upon that subject, and more particularly so when the principle of the law is intended to render secure the occupants of land, long possessed, and held without any molestation or hindrance, believing their title to be secure and legal.

I cannot feel myself justified in saying or believing, that the patent from Queen Ann was obtained by fraud. I shall never be ready, or prepared to believe in fraud, merely because it may be presumed. I have a better opinion of mankind, and shall require very substantial proofs, whenever I am compelled to believe it.

I do not find sufficient grounds in the charges contained in this bill, to satisfy my mind that I ought to be instrumental in disturbing a possession of such long standing.

This appears to me to be precisely one of those cases, where the decisions of this court should silence claims of this nature.

The wealth or the poverty of the parties, dwelt upon in the argument, should form no part of our consideration, either one way or the other, in making up our decision.

But in almost every case of such long standing and continued possession, the injury and injustice would appear to fall upon the party holding the estate, as no absolute loss can accrue to the party who never had the property, and who in all probability never knew of any shadow of right he might be supposed to have, until some meddling and perhaps interested friend kindly puts him in the way of going to law, to obtain a phantom, but in reality to lose a substantial fee. That this case has been brought in this way, I do not pretend to say, neither do I believe it.

[*640] "But I am decidedly opposed to all such antediluvian claims, and if once it is known, or believed, that estates and properties, no matter how long they may have been enjoyed, or honestly possessed by the occupant, can be disturbed and broken up, there is no estate, or farm in the whole country but some individual may be found to bring an outlandish, or outlawed claim, and break up the peace of honest men and their families, and destroy the comfort of whole communities.

I am therefore, decidedly of opinion that the decree of the chancellor should be affirmed.

On the question being put, *Shall this decree be reversed?* all the members

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of the court (seventeen being present) answered in the negative. Whereupon the decree of the chancellor was AFFIRMED.

*KANE and wife, *appellants*, and GOTTF and others, *respondents*. [*641]

Where a will was made directing real estate to be sold, the proceeds to be invested, and the income to be applied to the support of two nieces until they arrived to the age of twenty or married, and then the income to be paid to them in equal proportions during their respective lives; on the death of one without issue, the *whole income* to be paid to the survivor; on the death of both leaving issue, the *whole trust fund* to go to such issue: one moiety to the children of each, and on the death of the nieces without issue, the property to go to the mother of the testator; IT WAS HELD, that the nieces took immediate vested interests in their respective moieties of the *income* of the estate during their lives, with a remainder to the survivor for life in the moiety of the other dying without issue; and that on the death of both leaving issue, the fund went to their children.

Real estate directed by will to be sold, and the avails to be applied to the uses created by it, is in *equity* regarded as *personal property*; and the doctrine of *uses* and *trusts* and *limitations of real estate* has no application in such cases farther than is expressly declared by statute.

The statute in regard to *estates in personal property* treats only of *accumulations* of interest or income and of *expectant estates*. The mode of directing *accumulations*, so as to be valid, the statute specially points out. The suspension of absolute ownership is limited to two lives; and in all other respects, *limitations of future or contingent estates* are the same as if the subject were *real estate*.

Whether the *income* in the hands of the nieces is *inalienable*, and what is the effect of a decree declaring it so, *quere*.

A *will* may be *void* in part and yet good for the residue, and such portions of it as are not contrary to law will be saved; although it seems this conservative rule in the construction of wills has not always been observed.*

APPEAL from chancery. *William Cook* died seized of a considerable real estate, and possessed of personal property consisting of bonds and mortgages, and other securities, of the value of about \$120,000. In November, 1833, he made his last will and testament: by the *third* clause of which he gave, devised and bequeathed unto one John Gott and two other persons, whom he subsequently constituted executors of his will, all his estate, both real and personal, upon *trust*, to sell his real estate, (except certain specified portions,) and to invest the proceeds (not required to carry into effect any of the provisions of the will,) in public stocks, or in bonds and mortgages, and in like manner to invest and re-invest any other moneys which should come to their hands, so as to make the whole of his estate active, and yielding an income. By the *fourth* and *fifth* clauses of the will, he gave to *Jennet Cook*, the widow of a deceased brother, the use of a dwelling house and furniture, and an annuity of \$2000 during her life or widowhood,

* Decided December 26, 1840.

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for the support of herself and family. By the *sixth* clause, he gave an annuity of \$600 to his mother, *Candace Cook*. By the *seventh* clause, in case of the death of his sister-in-law, or her re-marriage before his nieces *Sarah* and *Jennet* should have attained the age of twenty or be married, he directed that they should have the use and occupation of the dwelling house and furniture, and should be supported and educated by the executors, and each have an annual allowance of \$1000. By the *eighth* clause, he gave to his nieces respectively, after they arrived to the age of twenty or were married, each an equal half of the income of his estate, after payment of the annuities to his mother and sister-in-law. By the *ninth* clause, in case of the death of either of the nieces after having attained to the age of twenty without issue, he gave to the *survivor* of them the *whole clear income* of his estate, and in case of the death of either leaving issue, he gave to such issue the moiety of the income of the estate, directing his executors to apply so much thereof as should be necessary to the support and education of such issue until the child or children should arrive at the age of 21 years, if male, and 20, if female; and if the niece dying should leave a husband, authorizing the executors to appropriate a portion of such moiety of the income towards his support, and to vest at interest the surplus. Upon the issue attaining the ages before mentioned to pay to the child or children, as they respectively became of age, a full share of the balance in their hands unexpended of the one half of the income of the estate, with any increase or accumulation thereof during the minority of such child or children respectively; and

to continue at interest any portion of the one-half of the income
[*643] *of the estate until such child or the youngest of such children

should come of age, and to pay the same with the increase thereof to such child, and if there should be more than one, to such children, in equal proportions. By the *tenth* clause, in case of the death of both nieces leaving lawful issue, he gave to the children of each one equal half of *all his estate*, both real and personal. By the *eleventh* clause, in case of the death of both nieces, and only one of them leaving issue, he gave the whole estate to such issue; and if such issue should be under age, he directed the executors to apply so much of the estate as might be necessary for their support and education, and until the youngest should become of age, to pay to such as should become of age during the minority of the youngest, an equal share of the income, and then to assign and transfer unto such issue all the money then on hand, and all the stocks and securities held, and to release to such issue any real estate to which they might have acquired title in the management of the estate; and by the *twelfth* clause of the will, the ultimate remainder in fee was limited to the mother of the testator in case both nieces died without issue in her lifetime. In July, 1834, the testator died, and in February, 1837, his executors and trustees filed a bill in chancery against his heirs and next of kin and the legatees named in the will, for the

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purpose of settling the construction of it, and to have the trusts thereof, if valid, carried into effect. At the death of the testator, his mother, *Candace Cook*, his sister-in-law, *Jennet Cook*, and his nieces *Sarah* and *Jennet* were living. *Sarah* became the wife of *John I. Kane* and the mother of two children. *Candace Cook* died previous to the filing of the bill by the executors. *Kane* and wife filed a cross-bill against the trustees, and against the mother, sister and children of Mrs. *Kane*, and against the representatives of the testator's mother, asking for a decree declaring void certain trusts and provisions in the will, and for a distribution of the estate (not legally disposed of) among the heirs and next of kin of the testator. The bill was taken as confessed against the mother of Mrs. *Kane*, and against the personal representative of the testator's mother. The case was heard by the chancellor upon both bills, and the answer of the [*644] several parties, and upon a master's report as to the facts of the case.

In May, 1839, the chancellor made the following decree: (for the reasons of which, see *7 Paige*, 521, *et seq.*)

“ *First*—It is declared and decreed, that the said executors as trustees took no estate or interest whatever in the house and lot, situate on the west side of Pearl street in the city of Albany, by virtue of the will of the said William Cook, deceased, in the pleadings in this cause mentioned; but that the whole beneficial interests devised, so far as the devise of an estate or interests in the house and lot was legal, passed directly to the persons for whose benefit the same were intended as legal estates.

“ *Secondly*—It is declared and decreed, that the direction in the will of the testator to his executors and trustees to convert all his estate, except the said house and lot on the west side of Pearl street, and the farm in Middlefield, into money, and to invest the same as personal estate for the purposes of the will, is valid as a power in trust, so far as the purposes of the said conversion are legal, as hereafter declared; and such real estate is in equity to be considered as converted into personalty from the death of the testator, for all the purposes of the will, which are valid as to the personal estate.

“ *Thirdly*—It is declared and decreed that the annuities given by the testator to his mother, and to his sister-in-law *Jennet Cook*, are valid, and are a charge upon the capital as well as upon the income of the personal estate, and the proceeds of the sale of the real estate. The executors and trustees are therefore directed to pay the last mentioned annuity in quarterly payments, either out of the income of such personal estate and of the proceeds of the real estate, or in their discretion, out of the capital of those funds, to purchase an annuity for the term of her natural life, of The New York Life Insurance and Trust Company, payable quarterly, or a similar annuity to be secured by bond and mortgage, on unencumbered real estate of double the

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present value of such annuity, exclusive of buildings, and pay such annuity to her quarterly, during her life or until she remarries.

[*645] “*Fourthly*—It is declared and decreed, that the provision in the will for the support of the testator’s nieces, after the death or remarriage of their mother, and while they are under twenty years of age and unmarried, is valid. And in case the contingency contemplated by the testator should happen during such minority of the infant defendant, Jennet M. Cook, and before her marriage, the executors and trustees are directed to provide for her accordingly.

“*Fifthly*—It is declared and decreed, that the true construction of the third and eighth clauses of the will is that the executors and trustees shall accumulate the income of the personal estate, and of the proceeds of the sale of the real estate which are not wanted for other purposes of the will, for the sole and exclusive benefit of the two infant nieces of the testator, one half for the exclusive benefit of each, and to be paid over to them or their personal representatives absolutely, when they shall respectively have arrived at the age of twenty years, or when they shall have married before that time; and that such accumulations are authorized by law and are valid. The executors and trustees are therefore directed to pay over to Sarah C. Kane her share of such accumulated income which became payable to her upon her marriage, or such part thereof as has not already been paid, and that they continue to accumulate the other half of the income as directed by the testator for the use of the defendant, Jennet M. Cook, and pay the same over to her or her personal representative, when she shall arrive at the age of twenty or be married, or upon her death, if she should happen to die under that age.

“*Sixthly*—It is declared and decreed, that the bequest to each niece of one half of the income of the personal estate, and of the proceeds of the sale of the real estate, after payment of the annuities, from and after she arrives at the age of twenty or is married, for and during her natural life, is a valid bequest; but that it is a limitation of a future interest in personal estate and in the proceeds of real estate, and her interest in the income of each is inalienable during her life, by the provisions of the revised statutes.

The executors and trustees are therefore directed to pay to Sarah C. Kane *the income of her half of the fund upon her separate receipt, or apply the same to her use, free from the control of her husband, from time to time, as the said income shall be received, but they are not to pay the same to her in anticipation of the receipt of the same, or to any person to whom she may attempt to assign it, before it is received by such executors and trustees. And they are also directed to pay over to Jennet M. Cook the income of her half of the fund, in the same manner, which shall accrue after she arrives at the age of twenty, or is married, or apply the same to her use.

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“ *Seventhly*—It is declared and decreed, that the bequest of the income of the niece who shall die without issue in the lifetime of the other, to the survivor for life, is also valid, but is subject to the same restriction upon the power of alienation. The executors and trustees are therefore directed upon the happening of that contingency, to pay over the income to the survivor, or to apply to her use, in the manner which is before directed.

“ *Eighthly*—It is declared and decreed, that the provision in the ninth clause of the will, giving to the children of the niece who dies first having issue, and to the husband of such niece, future contingent interests in the income of her share of the estate during the life of the survivor, and directing an accumulation during the minority of the youngest of her children, is illegal and void. The executors and trustees are therefore directed, upon the happening of that contingency to pay the income of that share during the life of the surviving niece, to such persons or their legal representatives, as would be entitled to the personal estate of the testator in case he had died intestate. So far as that income arises from the personal estate of which the testator died possessed, and so far as it arises from the proceeds of the sale of real estate, they are to pay it during the same time to the heirs at law of the testator or their personal representatives, as a contingent interest in the real estate not disposed of by the will.

“ *Ninthly*—It is declared and decreed, that the provision in the tenth clause of the will giving one half of the capital [*647] fund to the children of each niece in fee, after the death of both nieces leaving issue is valid. And upon the happening of that contingency, the executors and trustees are directed to pay over the fund to the said children or their personal representatives accordingly.

“ *Tenthly*—It is further declared and decreed, that the provision in the eleventh clause of the will as to the disposition of the income of the estate after the death of both nieces, in case only one of them leaves issue, and as to the limitation of the absolute ownership after the minority of the youngest child shall have terminated, is illegal and void. And upon the happening of that contingency as contemplated by the testator in that clause of his will, or upon the death of both the nieces without leaving lawful issue, after the death of the testator’s mother, the executors and trustees are directed to pay over so much of the fund, and of the income thereof, as has arisen from the sale of the real estate of the testator, to his heirs at law or their legal representatives, and the residue of the fund to his next of kin or their personal representatives, as directed by law in cases of intestacy. To enable the executors and trustees to comply with these directions, they are to keep separate accounts of the fund arising from the personal estate, and of the fund arising from the sale of the real estate ; and in keeping such accounts, the personal estate is to be considered as the primary fund for the payment

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of debts, annuities and the expenses of administering the estates, including all costs and expenses which are directed or decreed to be paid out of the fund in the hands of the executors and trustees.

“ *Eleventhly*—It is further ordered and decreed, that it be referred to the injunction or taxing master of the third circuit, to take and state the accounts of the executors and trustees for all monies received and expended by them, and of the proceeds of the real estate of the testator sold by them, exclusive of the income ; and that he also ascertain and report what is due to the said Sarah C. Kane on account of her share of the income arising both from real and personal estate accumulated for her benefit previous to the time of her marriage, and also what is due to her for such income subsequent to her marriage ; and that he also ascertain and report the amount of Jennet M. Cook’s share of the income and the accumulation of the same ; and that the said master report in the premises with all convenient speed.

“ *Twelfthly*—It is further ordered and decreed, that the said executors and trustees pass their accounts annually thereafter, from the date of that report, before the same *injunction* or taxing master, if he remains in office, or if not, before his successor as such injunction or taxing master, or before such other master as this court may designate for that purpose from time to time, during the continuance of their trust. And that upon the passing of the said accounts, the said master summon all proper parties, or their solicitors or guardians, to attend upon the taking thereof. And that upon the filing and confirmation of the report of the master, upon stating the accounts originally, or upon any subsequent passing of the accounts, if no exceptions have been filed, or if the exceptions have been disposed of by the court, the executors and trustees, or any other party to this suit, may, upon due notice to the other parties interested, or to their solicitors or guardians, apply to the court on any regular motion day, either in term or vacation, for a special confirmation of the master’s report, or for such other or further directions in relation to the trust of the executors and trustees aforesaid, as may be just, and as shall from time to time be deemed necessary ; and that the costs and expenses of the annual passing of such accounts be paid out of the annual income of the fund for the year immediately previous to the time of passing the accounts.

“ *Lastly*—It is ordered and decreed, that the costs of all the parties in these suits be paid by the executors and trustees out of the capital of the personal estate in their hands ; and that they also pay to the counsel and guardian ad litem of the infant defendant Jennet M. Cook, a reasonable counsel fee, upon the argument of this cause, to be certified by the said master, out of the accumulated income in their hands belonging to her.”

[*649] Kane and wife separately *appealed* from the 2d, 4th, 5th, *6th,

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7th, 9th, 11th, and 12th sections of the decree, and from the following part of the 8th section, viz :

“ The executors and trustees are therefore directed, upon the happening of that contingency, to pay the income of that share during the life of the surviving niece, to such persons or their legal representatives as would be entitled to the personal estate of the testator in case he had died intestate. So far as that income arises from the personal estate of which the testator died possessed, and so far as it arises from the proceeds of the sale of real estate, they are to pay it during the same time to the heirs at law of the testator or their personal representatives, as a contingent interest in the real estate not disposed of by the will.”

And also from all that part of the tenth section of the decree which is in the following words :

“ And upon the happening of that contingency as contemplated by the testator in that clause of his will, or upon the death of both the nieces without leaving lawful issue, after the death of the testator’s mother, the executors and trustees are directed to pay over so much of the fund, and of the income thereof, as has arisen from the sale of the real estate of the testator to his heirs at law or their legal representatives, and the residue of the fund to his next of kin or their personal representatives, as directed by law in cases of intestacy. To enable the executors and trustees to comply with these directions, they are to keep separate accounts of the fund arising from the personal estate, and of the fund arising from the sale of the real estate ; and in keeping such accounts, the personal estate is to be considered as the primary fund for the payment of debts, annuities and the expenses of administering the estate, including all costs and expenses which are directed or decreed to be paid out of the fund in the hands of the executors and trustees.”

The case was argued in this court by

James King, for the appellant, Mrs. Kane.

S. A. Foot, for the appellant, Mr. Kane.

**M. T. Reynolds & S. Stevens*, for the respondents.

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Points made and argued on the part of Mrs. Kane :

I. The provisions of the revised statutes are violated by the directions in the will, suspending the absolute power of alienation for more than two lives in being.

1. The absolute power of alienation is suspended for more than two lives in being, in the devise of the Pearl street house and lot. The testator, by

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the third section of the will, gives, devises and bequeaths his whole estate, both real and personal, to his executors in trust, and then, by the fourth section of the will, gives and bequeaths a contingent life estate to Mrs. Jennet Cook, in the house and lot in Pearl street, and afterwards a life estate to his two nieces during their joint lives. 1 R. S. 723, § 14, 15. *Dashwood v. Peyton*, 18 Ves. 40. *Upton v. Ferrers*, 5 id. 806.

2. The absolute power of alienation is suspended for more than two lives in being in the whole estate, by giving, in the seventh and eighth sections of the will, a life estate in the income to the testator's two nieces, and then, by the ninth, tenth and eleventh sections, farther suspending the power of disposition during the several minorities of the children of his two nieces, who were not in being at the time of the death of the testator, when the estate was created. 1 R. S. 730, § 63, 65 and 67. *Id.* 728, § 14, 15 and 16. *Revisers' Notes*, p. 23, on creation and division of estates. *Coster v. Lorillard*, 14 Wendell, C. J. Savage's opinion, pages 299, 305, 309; *J. Nelson's opinion*, 334, 335; *Senator Maison's opinion*, 359, 355. 1 R. S. 729, § 60. *Hawley v. James*, 16 Wendell, C. J. Nelson's opinion, 126, 120; *J. Bronson's opinions*, 163, 164, 169, 171, &c.; *Senator Maison's opinion*, 221, 222, 225, 228. *Coster v. Lorillard*, 14 Wendell; *Senator Young's opinion*, 386, &c. 4 Kent's Comm. 283, 2d ed.

3. The court cannot give effect to the estate in remainder upon the death of the testator's two nieces, because the trust estate is farther prolonged by the minority of the youngest child of the two nieces, who was [*651] not named in the will, nor it in being at the creation of the estate. 1 R. S. 724, § 19. *Hawley v. James*, 16 Wendell, C. J. Nelson's opinion, 120, 126; *J. Bronson's opinion*, 171. *Coster v. Lorillard*, 14 Wendell, C. J. Savage's opinion, 308. 4 Kent's Comm. 2d ed. p. 283.

4. It appears by the pleadings that William Henry Kane, a son of the testator's niece Sarah, was born on the twenty-sixth day of September, 1835, after the testator's death, and was not and could not be named in the will as one of the children during whose minority the trust estate was intended to endure. 1 R. S. 723, § 17, 15. *Hawley v. James*, 16 Wendell, J. Bronson's opinion, 171, 172. *Root v. Stuyvesant*, 18 Wendell, Chancellor's opinion, 264, 265.

5. The will does not specify any two certain lives during which the power of alienation was to be suspended; but it may, by the will, be suspended during the lives of Mrs. Candace Cook, Mrs. Jennet Cook and her daughters, and the minorities of their unborn children. *Hawley v. James*, 16 Wendell, J. Bronson's opinion, 172; *Senator Maison's opinion*, 222; *Senator Mack's opinion*, 208; *C. J. Nelson's opinion*, 129, 133. *Coster v. Lorillard*, 14 Wendell, C. J. Savage's opinion, 308.

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II. The provisions of the will violate the revised statutes, by creating a trust estate for objects and purposes not authorized.

1. There is no authority for the creation of a trust estate for the sale of real estate, for the purposes declared in the will. 1 *R. S.* 727, § 45. *Id.* 728, § 55. *Hawley v. James*, 5 *Paige*, 444.

2. There is no authority for the creation of a trust estate, in which the trustees can only stand seized of the title to the Pearl street house and lot, when the use and occupation is directly given by the testator to Mrs. Jennet Cook, during her life, or while she remains a widow, without any control or discretion of the trustees to be exercised over the same. 1 *R. S.* 727, § 47. *Root v. Stuyvesant*, 18 *Wendell*, *Chancellor's opinion*, 264, 265. 1 *R. S.* 752, § 6.

*3. There is no authority for the creation of a trust estate, for [*652] the mere purpose of authorizing the trustees to receive the income and pay the same over to the testator's nieces. 1 *R. S.* 728, § 55. *Coster v. Lorillard*, 14 *Wendell*, *C. J. Savage's opinion*, 321, 322, 323; *Senator Maison's opinion*, 353; *Senator Young's opinion*, 382, 383, 384. *Hawley v. James*, 16 *Wendell*, *J. Bronson's opinion*, 156, 157; *Senator Mack's opinion*, 213; *Senator Maison's opinion*, 266. *Revisers' Notes to § 55*. 2 *Kent's Comm.* 2d ed. 148. *Clancy's Rights of Women*, p. 1, &c. 2 *Blackstone's Comm.* 433, and note. 1 *Hilliard's Abr.* 246, § 16.

4. A trust estate to receive the income of an estate, and pay over the same, or apply it to the use of children unborn at the time the trust estate is created, cannot be sustained under the revised statutes. *All the authorities cited under 3d subdivision*; also, 1 *R. S.* 723, § 17. *Root v. Stuyvesant*, 18 *Wendell*, 264, 265. 1 *R. S.* 724, § 20, 24.

5. The purpose of paying an annuity, is not an object within the purview of the revised statutes, that can sustain a trust estate. 1 *R. S.* 728, § 55. *Coster v. Lorillard*, 14 *Wendell*, *C. J. Savage's op.* 329; *J. Nelson's op.* 348; *Senator Young's op.* 388; *Senator Maison's op.* 365, 366, 367, and *Decree*. *Hawley v. James*, 16 *Wendell*, *J. Bronson's op.* 152, &c.; *Decree*.

6. The mere duty of distributing the estate as directed under the eleventh section of the will, is not a sufficient object to sustain an express trust; and especially as that service is confined to the sole purpose of distribution, without the exercise of discretion or judgment on the part of the trustees. 1 *R. S.* 728, § 55.

7. The trust estate cannot be sustained under the third subdivision of the 55th section of the second article of title two of the revised statutes, on "Uses and Trusts," because the estate created is not made subject to the rules prescribed in the first article of that title. *All the authorities cited under the several subdivisions of the 1st point*.

III. If the trusts created by the will are not good as express trusts, neither are they good as powers in trust.

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1. Although the testator professedly *gives, devises* and [*653] **bequeaths* all his estate, both real and personal, yet in all the contingencies which he anticipates by a change of parties from death or otherwise, he *gives* and *bequeaths* or *devises* his estate both real and personal, or a share thereof, directly to the person he wishes to become invested with such share upon the happening of that contingency. He does not direct his trustees to convey, except in one case, but he *bequeaths* it, or *devises* it himself. 1 R. S. 732, § 73, 74, 78, 79, 128. *Id.* 729, § 58. *Id.* 723, § 14, 15.

2. As powers in trusts are charges upon all the lands of the testator, they necessarily suspend the power of alienation while they remain unexecuted, and are, therefore, subject to the same objection on the ground of the suspension of the power of alienation, as the illegal limitation of any other estate. *Same authorities as in last subdivision.*

3. There is not one direction or duty prescribed by the testator in his will for his trustees to observe or perform, which can be performed under a power in trust, except the sale of the real estate. 1 R. S. 732, § 73, 74, 78, 79; *p.* 729, § 58.

4. To release real estate as the trustees are directed to do in the eleventh section of the will, can only be done in the execution of a trust: and the trust in this case cannot be sustained for that purpose while it is held void for all other purposes.

IV. A trust is an entirety, and if void in part is void altogether. *Hawley v. James, Senator Mack's op.,* 213; *Senator Maison's op.,* 250, 251, 252, 16 *Wendell. Coster v. Lorillard, J. Nelson's op.,* 348, 349; *Senator Maison's op.,* 362, 363, 364, 365, 366, 367; *Senator Young's op.,* 385, 386, 387, 388, 389, 14 *Wendell.*

V. The directions to accumulate the surplus income of the testator's estate for the unborn child or children of his two nieces, are void, because the accumulation of the surplus income is not directed to commence within the time limited by the revised statutes for the vesting of future estates. 1 R. S. 724, § 87. *Hawley v. James, Chancellor's op.,* 481, 5 *Paige.*

[*654] VI. A valid trust in personal property can be created "under the provisions of the revised statutes by deed or will only for purposes for which a trust in real estate is authorized, and all other trusts in personal property are absolutely abolished by the revised statutes. 1 R. S. 727, § 45, 55. *Id.* 773, tit. 4, § 1, 2. *Revisers' notes on chap. 1, part 2,* *p.* 41, 42, 43.

VII. After the termination of a valid trust in personal property, the absolute ownership of such property cannot be farther suspended by any condition or limitation whatever. 1 R. S. *p.* 773, tit. 4, § 1. *Id.* 724, § 19, 20, 24. *Id.* 728, § 55, *sub.* 3. *Id.* 723, § 17.

VIII. Although a devise of real estate may be decreed to be void as an

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express trust, and the directions to convert such estate into personal estate may be sustained, as a valid exercise of a power in trust; yet, when the duties imposed by that power shall have been performed, the real estate thus converted cannot be held under the express trust so decreed to be void. 1 R. S. 728, § 55. *Id.* 729, § 58. *Id.* 732, § 77. 1 Story's *Equity*, p. 79, § 61, *and authorities there referred to.*

IX. The decree of the chancellor modifies and alters the will so far that the intentions of the testator are utterly defeated, and great injustice may be done thereby to the parties who are the objects of the testator's bounty; and therefore the whole trust intended to be created should be declared void; and as both the annuitants are dead, a decree should be entered by this court, remitting the cause to the court of chancery, with directions that the executors should settle their accounts before a master in that court; and that the personal property in their possession should be equally distributed between Sarah C. Kane and Jennet M. Cook, who are the next of kin to the testator, and also to declare that all the real estate of which the testator died seized descended to them, his heirs at law, in equal portions, except the Otsego farm, in which Eliza Andrus takes a life estate, and her children an estate in remainder at her death.

Points made and argued on the part of Mr. Kane:

I. If the opinion of the chancellor is correct, that the *revised [*655] statutes have not defined the objects for which express trusts of personal property may be created, and that such trusts, therefore, may be created, for any purposes permitted by the common law, still the absolute ownership of personal property cannot be suspended by any limitation or condition whatever for any longer period than the absolute power of alienation of real estate, viz. during the continuance of two lives in being at the death of the testator, if the suspension is by will. 1 R. S. 773, § 1; p. 723, § 14, 15. And in all other respects, limitations of future or contingent interests in personal property are subject to the statutory rules applicable to real estate. 1 R. S. 773, § 2.

II. The general trust of the real and personal property, in this case, was created to pay an annuity to Candace Cook during her life; to pay an annuity to Jennet Cook while she remained unmarried, which by possibility might be during her life; to pay the income of all the testator's real and personal estate, after satisfying the annuities, to his two nieces during their joint lives, in equal shares; and if one died, to pay the whole to the survivor during her life; and if either died leaving issue, to support and educate such issue out of the income, and keep the surplus accumulating till the youngest of such issue became of age. Candace Cook, Jennet Cook, and the two nieces, were in being at the death of the testator. The trust

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in this case, therefore, suspended the absolute ownership of the personal property, and the absolute power of alienation of the real estate during four lives in being at the death of the testator, and during the minorities of an unlimited number of unborn children of the two nieces, and whose minorities by possibility might extend beyond each, any two, or all of the four lives in being at the death of the testator. The whole trust is therefore void, and all the devises and bequests dependent upon and connected with it. *Lorillard v. Coster*, 14 Wendell, 265. *Hawley v. James*, 16 id. 61. *Root v. Stuyvesant*, 18 id. 257.

III. The trust of the *real estate* is void for the following additional reasons: 1. It is an express trust, and yet not created for any purpose allowed by the statute. 1 R. S. *728, § 55. 2. If it be admitted that the trust of the real estate, so far as regards the authority to sell, is valid as a power in trust, the proceeds are still subject to the trust of the real estate, and must abide the consequence of its being declared void; for the trustees cannot hold them as personal property under a trust which may be valid for such property, because such a principle would in effect repeal the statute restricting trusts of real estate, and render it nugatory, for all real estate could then be conveyed in trust to sell, and the proceeds held on trusts admissible in respect to personal property. 3. The trust of the real estate is to receive rents, profits and income, and *pay them over*, and not to *apply them to the use of the cestuis que trust*. *The same cases as those cited under the 2d point, and 1 R. S. 773, § 2.* 4. The trust of the real estate being void as such, and only valid as a power in trust so far as regards the authority to sell, the title to the real estate descended to the two nieces, subject to the naked power of the trustees to sell. 1 R. S. § 58, 59; and that power was invalid, because it could not be exercised for the purpose of subjecting the real estate in the form of proceeds, to trusts not allowed in respect to such estate.

IV. If the trust of the real estate is void for all or any of these reasons, the whole trust must fall, and all the devises and bequests dependent on it, as the trust of the real estate is connected and mingled with the whole trust, and forms an integral part of it. *Same cases as those cited under the 2d point.*

V. Trusts of personal property are subject to the same rules as those of real estate. 1 R. S. 773, § 2. And the trust of the personal property in this case being to receive interest and income, and *pay them over*, and not to *apply them to the use of the cestuis que trust*, is void; and consequently the whole trust, and the devises and bequests dependent on it, are invalid.

VI. The trust is the principal part of, indeed almost the whole will; and if void, the will itself is void, with perhaps the exception of the two devises

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relating to the house and lot in Pearl street, and the farm in Middlefield.

The counsel for Mr. Kane adopts and insists upon most of the points made on the part of Mrs. Kane.

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Points on the part of the respondents :

I. The second section of the decree appealed from, by which the validity of the third clause of the will is established, is in all respects in conformity with the rules of law and principles of equity, and should be affirmed. Two questions only are presented by this part of the decree.

1. Are the directions to the executors in the third clause of the will, to convert the real estate therein mentioned into money, valid, either as a trust or as a power in trust ? and,

2. Is such real estate in equity to be considered as converted into personalty from the death of the testator ?

II. The fourth section of the decree appealed from, by which the seventh clause of the will, which provides for the support of the testator's two nieces after the death or re-marriage of their mother, and while they are under the age of twenty years, is declared valid, is legal, and should be affirmed.

1. The trust created by this provision of the will, whether it be deemed a trust of real or personal estate, is valid.

2. The power of alienation cannot be suspended by this provision beyond the duration of two lives in being at the death of the testator, to wit, the lives of the two nieces.

III. The accumulations directed by the third and eighth clauses of the will, commence at the death of the testator, are for the sole and exclusive benefit of the two infant nieces who were minors then in being, the one half for the exclusive benefit of each, and to be paid over to them or their personal representatives, absolutely, when they shall respectively have arrived at the age of twenty years, or when they shall have married before that time ; and consequently must cease at or before the expiration of their minority. The fifth clause of the decree appealed from, establishing the validity of these accumulations, should therefore be affirmed. 1 R. S. 728, § 37 ; 773, § 3.

IV. The sixth section of the decree appealed from, is the legal and correct exposition of the eighth clause of the will, *and [*658] of the effect of the statute on the estate or interest thereby devised and bequeathed, and should be in all things affirmed.

1. If this were to be deemed a trust of real estate, it is valid under the 3d subdivision of the 55th section of the statute. *See Chancellor's opinion.*

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2. But the trust created by this will is a trust of personal estate, the objects of which are not limited by the statute, and the purpose for which it was created being legal, it is valid. *See Chancellor's opinion.*

3. The devise or bequest of one half of the income to each niece, after the accumulation ceases, is a future interest in personal property, and must therefore be subject to the rules in relation to future estates in lands; consequently the persons beneficially interested in the trust, to receive such income, cannot assign or dispose of such interest during their lives. *See Chancellor's opinion.* 1 R. S. 773, § 2. *Id.* 730, § 63.

V. The 7th section of the decree appealed from, by which so much of the 9th clause of the will as bequeaths the income of the niece who shall die without issue to the survivor for life is declared valid, and subject to the same restriction upon the power of alienation, should be affirmed for the reasons assigned in support of the last point. *See Chancellor's opinion.* *See also 1 R. S. 723, § 17, as to two successive life estates.*

VI. All that part of the 8th section of the decree appealed from is valid, and should be affirmed. *See Chancellor's opinion.*

The directions in that part of the 8th section of the decree which has been appealed from, necessarily follows from that part of the same section of the decree which has not been appealed from, and which is therefore conceded to be legal.

VII. The 9th section of the decree appealed from is valid, and should be affirmed. *See Chancellor's opinion.*

VIII. All that part of the 16th section of the decree appealed from is legal and valid, and should be affirmed.

The first part of the 10th section of the decree, by which the [*659] provision in the 11th clause of the will as to the disposition of the income of the estate after the death of both nieces, *in case one only* shall leave issue, and as to the limitation of the absolute ownership after the minority of the youngest child shall have terminated, is declared to be illegal and void, is not appealed from, and is therefore admitted to be legal.

All that part of this section of the decree which is appealed from, is nothing more than the directions necessary to be given, if that part of the decree not appealed from is correct, and its correctness cannot now be disputed.

IX. The 11th and 12th sections of the decree appealed from, directing the mode and manner of taking and passing the accounts of the executors, are legal, and should be affirmed.

X. The appellants should be charged personally with the costs of this appeal, to be taxed in favor of the respective respondents, and the executors should be allowed their counsel fees and expenses out of the capital of the

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personal estate, and the counsel fees of the guardian ad litem of Jennet M. Cook should be paid out of the accumulated income in the hands of the executors, belonging to her.

After advisement, the following opinion was delivered:

By COWEN, J. An easy solution of the main difficulty raised by these appeals, is to be found in that feature of the will which converts the whole of the property under question into personal estate. A trust in the executors is created with imperative directions to sell as soon as may be the testator's whole real estate, except certain specified portions not now in question, and appropriate the avails to the purposes of his will, in connection with his other personal property. It is of the nature of such a trust that immediately on the testator's death, and for all the purposes of testamentary disposition, the *real* becomes *personal* property in every sense; and must be treated precisely as if it had been so before. This is a position so entirely clear, that nothing was introduced among the printed points of either *appellant, to the contrary. It was not denied in argument to be ['660] the settled doctrine; but, as an incidental complaint was thrown out, that it is but a fiction, which ought not to stand in the way of the revised statutes when they come to destroy trusts, we may as well look at the strength of the footing which it has obtained in our law. In Jarman's edition of *Powell on Devises*, it is said, "on the principle that equity considers that as done, that ought to have been done, it has been long established that money directed to be employed in the purchase of land, and *land directed to be sold, and turned into money*, are to be considered as that species of property into which they are to be converted; and this in whatever manner the direction is given, whether by *will*, by contract, &c. It follows, therefore, that every person claiming property under an *instrument* directing its conversion, must *take it* in the *character* which that instrument has impressed upon it, &c. This principle is obviously founded in justice and good sense, &c. It is, besides, too well settled by numerous authorities to be called in question at this day." An unbroken series of cases are cited by the book, ranging from *Charles 2*, to the time when the learned editor was writing. 2 *Jarman's Powell*, ch. 4, p. 60. In a late work devoted to the doctrine of *equitable conversion*, it is said to be "highly interesting, as involving consequences of great importance to the community at large." And though difficulties may arise in its application, it is reducible to some of the most just and simple principles on which the jurisprudence of our courts of equity has been formed." *Leigh and Dalzell on Eq. Conversion*, ch. 1, p. 1. It will be seen by the cases cited in 2 *Powell*, 64, and *Leigh and Dalzell*, 48, that where executors are clothed with a trust to sell the real estate for

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money, and appropriate the avails to the uses of the will in the form of personal property, no doubt was ever entertained that it must be considered in equity, the same as if the testator had himself sold land, and then bequeathed the consideration money. Sitting in a court of equity, therefore, we can no more refuse to consider the whole of the real property in question as personal, than we could in a court of law, if the testator had himself chosen *to make it physically so, and then had bequeathed it. By his own act he had the power to throw it into this shape either by sale or by will; and if in either way it be thus withdrawn from the operation of the statute concerning trusts, it is only in the exercise of a power by the absolute owner of property which no court or legislature ever thought of denying. This is the first time in centuries, and indeed the only time in our judicial history, that a doubt has been started on the effect of provisions such as are contained in this will. In the progress of the inquiry, therefore, I shall assume that the question stands entirely on the power of a testator to create a trust and limit estates in his personal property. The doctrine of trusts and limitations of real estate has nothing to do with it, farther than the revised statutes may have expressly brought personal property to the same footing or measure.

The revised statutes concerning uses and trusts, 1 R. S. 721, 2d ed., have of themselves nothing to do with personal property, either directly or by reference. That statute declares that uses and trusts, except as authorized and modified in article second, are abolished. § 45. The whole article is then in terms confined to *real estate* or its rents and profits. The 55th section declares and defines the only express trusts which can be fastened on such estate; and there the only trusts at all analogous to those now in question are spoken of in the third and fourth subdivisions of the section, viz. a trust to pay over the rents and profits, and to accumulate them for the benefit of persons named or not in *esse*. There is nothing in any part of the statute tying up the trust in *personal* property to receiving and applying the income to the use of any person, or otherwise restricting the mode of appropriation. The third subdivision speaks of the rents and profits of *lands* only. The right to these are, by § 63, declared inalienable. Such a provision has been, therefore, looked upon by several cases as furnishing one sort of element by which a limitation may be destroyed. In any view, the statute should be construed with great strictness. It is supposed that 1

R. S. 761, 2, 2d. ed. § 1 and 2, place both real and personal property *on the same narrow footing as to a *declaration of trust*.
[*662] But that is not so. These sections relate exclusively to *limitations of future* or *contingent* interests in personal property, making them subject to the same rules as limitations of *future* estates in lands. The word *limitation*, when applied to future or contingent estates, regards the time at,

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or condition upon which they are to vest, either as an interest or in possession. The same word when applied to a vested estate, regards its duration. *Toml. Dict. Limitation of Estate.* 1 *Preston on Estates*, 38, 40, *Am. ed.* of 1828. In neither sense has it any respect to the particular manner in which the beneficiary is to be supplied under the trust. The latter is a mere *appropriation* of the fund; and may at common law, be as various as the purposes of the donor. *Limitation* is another matter. When the interest is vested, this may be long or short according to the pleasure or caprice of the donor, because the land may always be aliened. But when the limitation is on a contingency it must be confined within certain boundaries of time; otherwise you run into an objectionable perpetuity. This is about all that is meant by the various provisions of the revised statutes against perpetuities. Thus the revisors say, in commenting on § 14, 1 *R. S.* 718, *2d ed.*, “To prevent a possible difficulty in the mind of those to whom the subject is not familiar, we may also add that an estate is never inalienable, unless there is a contingent remainder, and the contingency has not yet occurred. This is the meaning of the rule of law prohibiting perpetuities, and is the effect of the definition in § 14.” 3 *R. S.* 573, *2d ed.* Under the old law, the objection commonly arose on executory devises. I know that in the case of real estate, § 14 has been extended by construction to a vested interest under § 55 and § 68. But that was grounded on the restraint of alienation arising from the mode of appropriating rents and profits in a trust of *real estate*, and *real estate only*; not by reason of the contingent limitation. In the case of personal property, we are still left to the rule in the revisers’ note. We are, on the point of perpetuity, to regard the contingent character of the limitation alone; and if the event be *not too [*663] remote, the limitation is valid, whatever be the form in which the trust is to be executed. The provisions in regard to estates in personal property are made by a distinct title of the statute, and profess to treat of accumulation and *expectant estates only*. *Tit. 4, p. 761 of vol. 1.* This title is in detail confined to those objects. The first section limits the suspension of absolute ownership to two lives. This suspension, as we have seen, is predicable of *contingent estates* only. Then the second section is, that in all other respects, limitations of *future* or *contingent interests* shall be the same as if the subject were *real estate*. The remaining three sections of title four regard accumulation, which may, and in its nature, must be generally conducted through the medium of a trust. And here alone do we find any thing directly cutting down the power to create trusts in personal property.

But counsel recur to the broad meaning of the words used in the statute of trusts. “*Trusts, except as authorized and modified in this article, are abolished.*” 1 *R. S.* 721. We are told that the only trusts authorized by

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the article are those implied by law, § 50, and the few express trusts enumerated in § 55. Taking the broadest abstract meaning of the word *trusts*, and disregarding the context, the counsel are right in saying that all express trusts in personal as well as real property would be included. The clause in a will directing an executor to apply a portion of the assets to any particular purpose, as to procure a monument or an epitaph, would be void. So all charitable trusts, and, for aught I see, all legacies in a will. These and the like are no less than express trusts. All that the law would imply as the duty of an executor, would be to collect and pay debts with funeral expenses, and distribute the balance of the estate among the next of kin. All the express trusts of business life, this side the grave would also be abolished. Instructions to servants, factors, auctioneers, all special agencies accompanied by bailment would be destroyed. A vivid imagination might even carry the provision into the moral world, and say that men should no longer repose a trust or confidence in one another. By cutting off all that fol-

[*664] lows in and *after the first section, one knows not what would set bounds to the extravagance of construction. Whereas the very first section, when read through, shows clearly the limitation under which it must be taken. The whole of it is thus, § 45 : " Uses and trusts, except as authorized and modified in this article, are abolished ; and every estate and interest in *lands* shall be deemed a legal right cognizable as such in courts of law." Every subsequent section of the article, from 45 down to 72, uses language most obviously applicable to technical trusts in *real estate*, and nothing else. I have already shown that there is nothing in the subsequent provisions concerning personal property which can, without a perversion of language, be made referable to any provision in this article. They refer to the next previous one on estates ; to what extent it is not necessary to enquire while considering the mere declaration of trust. The learned chancellor being clearly right in saying that this was so far a common law matter, it becomes unnecessary, at least for the present, to institute an examination of its validity on the hypothesis that it comes within the 55th section.

The only question remaining is, how far the limitation of the trusts conform to the provisions in article first concerning the creation and division of estates. The bequests of annuities to the sister in law and mother of the testator are distinct independent vested legacies payable out of the principal of the fund. The executors are, by the will, created trustees with the express duty to make the payment. The whole stands on the footing of any other common pecuniary legacy ; and unless the statute has abolished the trust in executors to pay legacies, it is valid. The same thing may be said of the neices, so far as the legacies are for their benefit personally. *Quoad hoc* there is no contingent estate in question ; but the limitation is of a pres-

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ent vested estate in each for life. The provision for accumulation during their minorities is expressly authorized by the statute. 1 R. S. 767, § 3, sub. 1.

Passing beyond the immediate lives of the nieces, we do find ourselves in the region of future and contingent estates ; and here the statute of limitation of estates becomes applicable. *Admitting the cross [*665] remainders between the nieces to be contingent, it cannot be pretended that they are void as being too remote. They are clearly within the compass of two lives in being. We then come to the issue of the nieces. The limitation of income to them was a contingent remainder. So to the surviving husband of the niece who should die leaving issue, living the other niece. The husband being unmarried, and the issue unborn, both events and persons were uncertain. The final vesting of the absolute property is also made to fluctuate on various events, but the provisions in these respects aim at no events which can be questioned as too remote. All the contingent provisions as to income in favor of any person beyond the nieces, were cut off by the chancellor as illegal and void ; and that part of the decree which does *this*, is not appealed from. *Pro tanto*, he held that the income was undisposed of and ordered it to be paid by the executors to the testator's next of kin or heirs according to the nature of the estate out of which it may arise. That part of the decree which makes this consequential distribution, is appealed from ; but no distinct point was made against it, and very little said about it on the argument. It struck me at first that the whole income arising from the avails of the real estate, even the income undisposed of by the will, should be considered as personal estate, and go to the next of kin. However, another view is, that, so far, the income being untouched by the will, it is not converted ; but left to its original character, as income from real estate. This may be refining too much ; but without farther discussion, I am not prepared to say that the refinement has no foundation. The question seems to be practically of but little moment in any point of view. There is nothing that I see in the statute concerning the limitation of estates, carrying any of this undisposed income to the next eventual taker.

The most important consequence sought to be drawn from the will being void in respect to these remote collateral provisions, is, that therefore the whole is necessarily void. Nothing is better settled than the direct contrary ; and the contrary was held by this court in the late case of *Darling v. Rogers*, 22 Wendell, 483. That a will or any [*666] other instrument passing an estate may be void in part, and yet good for the residue, was never doubted, when the division into good and bad parts was made by force of the common law ; and *Darling v. Rogers* maintained a trust deed under the revised statutes in such parts as were good, though one declaration of trust was void. I know there are a sort of

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standing quotations to the contrary, of cases decided by this court. They appear upon the printed points: *Coster v. Lorillard*, 14 Wendell, 265; *Hawley v. James*, 16 id. 61; *Root v. Stuyvesant*, 18 id. 257. So far from sanctioning the doctrine for which they are cited, the opinion of every judge who spoke to those cases expressly denied it. It is true, that the wills in question went pretty much by the board; but all that can be said as a consequence is, that the conservative rule was not liberally applied. If that be so, it is sufficiently unfortunate; for there is no rule of law which calls for greater latitude and even ingenuity in enlarging and extending it. The most able and safe judges have said that the courts should be astute in allowing it a comprehensive operation for the giving effect to all instruments, and especially to last wills and testaments; and though some parts may be contrary to the rules of law, yet all other parts should be saved. Any court acting systematically upon the opposite principle, would be a great evil.

But the sixth and seventh clauses of the decree pronounce the *income* in the hands of the nieces and their issue *inalienable*, as if it came within the 63d section concerning express trusts. I have already given my reasons why this cannot be so; and perhaps the appellants might, on a proper course, have had the decree modified in the parts mentioned. The learned chancellor thought that if the income were derived from real estate, the trust would yet have been valid within the third subdivision of § 55. Perhaps he is right; but at any rate he is clearly so in saying that all, so far, is personal estate; and therefore I have inferred that the question cannot arise under that subdivision. The rules of real property are not impressed upon personal property, except as to *future contingent limitations*.

[*667] Here the income *is vested* in the nieces; though I admit it is future and contingent in the remainders. But the 63d section is not a section of *limitation*. It merely impresses an inalienable character on the income of real property, which happens to be *appropriated* in a certain form. It disqualifies the beneficiary to alien. It treats him as it would an infant, by imposing a personal disability. It is in derogation of common right, and ought not to be extended by analogy or construction. The decree aims so to extend it. But I am not prepared to say that it should therefore be modified. There is, to be sure, a simple appeal from those parts of it which I think are erroneous; but the points made, and the whole drift of the argument by the counsel for the appellants, were opposed to the idea that the income of personal estate can be put in trust for any other purposes than are allowed to rents and profits of land; and though the respondents denied this, they still maintained the chancellor's reasoning, from construction and analogy. The question of inalienability, therefore, has not been argued. The counsel on both sides agreed in the propriety of the income being considered inalienable, provided the will is to be maintained in its prin-

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cipal provisions, as it clearly must. Beside, the declaration in the decree, that the income shall be inalienable, cannot have any effect, except as a temporary direction and qualified protection to the executors. A decree that property in A.'s hands shall be inalienable, will not make it so. Suppose he takes a title in fee simple under a decree for a specific performance, and the decree should go on to say that it should remain inalienable in his hands ; no one would suppose that a perpetuity could be created in this way, though the decree should profess to be founded on the construction of some parts of the revised statutes. Property is alienable ; and no court, as such, can impress a condition upon it, which shall be repugnant to its very nature. The alienee would not be bound, in the case put, nor would he, for the same reason, in the case before us. On his coming in as a party, the question would be entirely open as to the right, though the trustees would not be subjected to costs for refusing to pay him. I presume, however, the point was not made and argued even in the court below ; and for that [*663] reason, if no other, we ought not finally to pass upon it now.

I am of opinion that the decree is not in any part so impeached that this court ought to interfere, either by reversing or modifying it. Therefore it should be affirmed.

On the question being put, *Shall this decree be reversed?* all the members of the court (eighteen being present,) with one exception, voted in the negative, whereupon the decree was AFFIRMED.

THE MAYOR, &c. OF THE CITY OF NEW-YORK vs. PENTZ.

A party whose property in the city of New-York has been destroyed by an order of the city officers, to prevent the spreading of a conflagration, is entitled to an allowance as damages to the full value of the property destroyed, without any deduction of the amount insured. So he is also intitled to *interest* on the value of the property from the time of its destruction. The *opinions* of mere by-standers, that the buildings destroyed would have taken fire and been consumed, had they not been blown up by order of the city officers, are inadmissible in evidence ; but whether the opinions of *firemen* and others having particular knowledge and experience in reference to fires, connected with a statement of the facts upon which such opinions were formed at the time, would not be admissible, *querat*.

ERROR from the supreme court. *W. A. F. Pentz* and his partners, a mercantile firm had two buildings blown up by order of the mayor of N. York, in the great fire in that city, in December, 1835, to prevent the spreading of the conflagration ; and had their damages assessed, under § 81 of the general act relating to the city of N. York, 2 R. L. 368, at \$39,476.54. The *buildings* were worth between \$29,000 and \$30,000, and the *merchandise*,

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dize in the buildings at the time of their destruction, was worth \$18,585,82. The Messrs. Pentz were *insured* \$10,000 on their merchandize. On the assessment of the damages, the counsel for the corporation insisted [*669] that the owners of property destroyed which was *insured*, were not entitled to an allowance of damages for the value of the property insured to the extent of the amount insured, and at all events, that the amount received on such insurance should be deducted; and also insisted that the claimants were not entitled to *interest* on the value of the property from the time of the loss until the taking of the inquisition; upon which propositions the presiding judge charged against him. The counsel for the corporation, after enquiring of each witness examined before the jury, and proving by him that he was present at the fire, asked this question: "Would in your judgment the stores blown up have taken fire and been destroyed, had they not been blown up?" The counsel for the claimants objected to such evidence as inadmissible, and the objection was sustained by the court. The assessment was confirmed by the common pleas of New-York, and the proceedings being removed into the supreme court by *certiorari*, were *affirmed* in that court. This case came before the supreme court and was decided at the same time that the case of *The Mayor, &c. of New-York v. Stone and others*, 20 Wendell, 139, was brought up and decided. The corporation removed the record into this court by writ of error. The case was argued here by

G. F. Talman, for the plaintiffs in error.

D. Lord, jun. for the defendants in error.

Points for the plaintiffs in error:

I. The mayor, aldermen, &c. of the city of New-York are not liable to damages for the loss of, or injury to, goods in the buildings destroyed. 1 *Dyer*, 36, b. 1 *Dallas*, 363. 2 *Kent's Comm.* 338. *Com. Dig. tit. Pleader*, 8 M. 30. 4 *T. R.* 796. *Dwarris on Stat.* 689, 690, 694, 695, 696, 749, 750. *Viner's Ab. Stat. Construction E.* 6, pl. 1, 19, 34. 3 *Cowen*, 89. 15 *Johns. R.* 358. 5 *Cowen*, 165.

II. If liable for goods at all, such liability is confined to the damages of the owners and persons having an estate in the buildings, and [*670] does not extend to goods held on *consignment*, or for sale on commission, nor to goods deposited on storage, nor to advances made on goods held for sale on commission.

III. In estimating the damages of the claimants who had effected insurance on the property destroyed, the amount which they had received, or were entitled to and could receive, from the insurers, ought to have been deducted. *Corlies v. City Fire Insurance Co.* 21 *Wendell*, 867.

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IV. The court erred in charging the jury that the claimants were entitled to interest on the amount of damages from the time of the fire to the time of the assessment. 5 *Cowen*, 587. 7 *Johns. R.* 112. 15 *Id.* 24. 7 *Wendell*, 178.

V. The evidence offered of the opinion or judgment of persons who were present at the fire, and saw the circumstances thereof, that the buildings would have been destroyed by the fire if not blown up, was improperly excluded. 2 *Stark. R.* 191, 258. 3 *Doug.* 157. 17 *Wendell*, 186. 4 *Cowen*, 355.

Points of defendants in error:

I. The recovery of the defendants in error ought not to be diminished by any deduction for their contracts of insurance; upon which they have received nothing.

II. The purposes of the act being to indemnify the party sustaining damage, the latter must have not only the value of the goods replaced to him, but that value as of the time of the destruction for the public benefit; consequently interest ought to be allowed from the time of destruction.

After advisement, the following opinion was delivered:

By Senator VERPLANCK. The first question in this case is, whether the recovery of the plaintiffs in the court below for damages sustained by reason of the destruction of their property by the city magistrates according to law, to prevent the spreading of a conflagration, ought not to be lessened by the amount which might be recovered of the underwriters, who are liable for their insurance upon the same "property. The underwriters being clearly liable to the owners for such a loss, this is, [*671] in other words, the question whether the insurers if they had paid it would be entitled to their proportional share of the present recovery. If the underwriters are not entitled to be repaid the amount of damages which they make good, then it must follow that the amount which may have been, or may hereafter be received of them, must so far diminish the total amount of damages, which the owners of the property destroyed have sustained by the act of the magistrates. If they are entitled to such an interest in the recovery, when they had paid their share of the loss, it is manifest that before settling the loss they are equally entitled to be wholly discharged from it by the owner's being made good by the city, under the statute, to the full amount of his loss. *

If we admit the very broad sense of the words "interest," and "interested," in the act under which the recovery is had, as it was maintained in the other cases growing out of the same memorable conflagration, the insur-

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ers are evidently comprehended without any regard to their peculiar rights as assurers, subrogated to the rights and claims of those to whom they are or have been responsible. But waiving the consideration of that question until the decision of those cases which depend wholly upon it, this case, I think, may be decided altogether upon the principles of the law of insurance.

It is well settled that the insurer is entitled to be substituted to the rights of the party whom he indemnifies to the extent of the loss he thus assumes. Whatever rights the owner of insured property may have in relation to them, pass to the assurer as much as if the owner had formally assigned those rights.

The doctrine long ago laid down by Lord Chancellor Hardwicke, has often been reasserted and applied. “The person originally sustaining the loss *was* the owner, but after satisfaction made to him, the insurer is; no doubt, but from that time as to the goods themselves, if restored *in specie* or compensation made for them, the assured stands as trustee for [*672] the insurer in proportion to what he paid.” 1 *Vesey. R.* 98.

From this and similar judicial authorities, our judicious American commentator on the law of insurance, draws the inference that “if the risk of barratry or any misconduct of these persons is insured against, and a loss is paid on that account; and subsequently the assured recover the damages from the master, there can be no doubt that the insurer would be equitably entitled to the damages so recovered, or to the proportion in which he had made indemnity.” 1 *Phillips on Insurance*, 464.

I had some transient doubt whether this principle was not confined (so far as mere authority went) to marine abandonment, so as to rest upon the formal relinquishment of the subject of insurance to the underwriters, with all its contingent and appurtenant rights of property and chances of recovery or indemnity. But I am satisfied that in marine insurance, it is now the settled law that an actual abandonment is not necessary to give the insurers a right to receive the proceeds of claims arising out of losses which they have paid. See cases collected in 1 *Phillips on Ins.* 465, and among the cases in our courts, *Suydam v. Marine Insurance Company*, 2 *Johns. R.* 188. *Gracie v. N. Y. Ins. Co.* 8 *Id.* 183. So far is this principle of substitution carried, that insurers on freight are now held to be entitled to the benefit of other freight carried, instead of that for which they are made liable. 6 *Taunt. R.* 68. There is nothing in the notion of insurance against fire to distinguish it in this matter from marine risks, and the doctrine has been also applied to life insurance; for in the case of the insurers of the life of William Pitt, 9 *East, R.* 72, it was held that the insurers who were liable to pay as guarantees in an agreement of indemnity, were entitled to the benefit directly or indirectly of what was paid by the debtor him-

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self or by government on his account. As therefore the insurers are entitled to be substituted to the owner in proportion to the loss paid, and succeed to all his rights, it can need no argument to show that the owner himself may recover and retain to the whole amount, whenever he waives that right against his insurers, and look first to other responsibility to make good his loss.

The allowance of *interest* must generally be regulated by the [*673] circumstances of the case. Here the expressed intent of the statute is to give compensation for the damages sustained by reason of the act of the magistrates in a case of necessity. The allowance of interest is the only mode whereby compensation can be made for that portion of the damages which results from long deprivation of the use and enjoyment of capital. There were no circumstances of delay or laches on the part of the claimants, to lessen their right to such compensation. The only delay was (so far as appears) for the convenience of the defendants in the court below, who were in the mean time (as we know by the legislation on the subject) enabled thus to save the interest to be paid on the funded debt contracted to meet their losses. The destruction by public authority, for public benefit or for that of any citizen, is in the nature of a forced sale, as when lands are taken for a canal or a street. In such case the debt relates back to the time of taking the property and its then value. The debt is then incurred by the state or the neighbourhood, and the interest should begin to run unless the party has himself caused delay.

There is yet a third question, involving an important rule of evidence of frequent application. It was agreed that the defendants below should be considered as having insisted on their right, after enquiring of each witness and proving by him that he was present at the fire, to propose this question: "Would, in your judgment, the stores blown up have taken fire and been destroyed, had they not been blown up?" Also that this question should have been considered as objected to on behalf of the claimants, and decided by the court to be inadmissible, and such decision excepted to by the counsel for the city. Was it then improper to exclude the evidence of the opinion of persons present, that the damage sustained in consequence of the destruction by order of the magistrates, would have been equally incurred by the progress of the flames? The broad rule to which the ancient law scarcely knew an exception, is that testimony can relate merely to facts and that the inferences from them are to be made by the jury. In ordinary cases the issues being strictly on the existence of [*674] facts capable of being proved or disproved by direct evidence, opinion as well as hearsay, must be excluded. But this general rule has been broken in upon by the admission of various classes of evidence resting on the common grounds of necessity. Such necessit-

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exist when the facts in issue are not themselves accessible by evidence, being either future probabilities or mere contingencies, or else actual facts, but not within positive knowledge: all of these must of necessity be judged of, only from other proved facts known generally to accompany or to indicate those in question: as for instance, when the facts to be ascertained are inferred from some rule of art, or science, or observed law of nature thus proved. The knowledge by which the existence of the unknown fact is inferred from the one proved may not fall within the range of ordinary information, but must be proved by professional or experienced witnesses having peculiar skill in some art, trade or science relating to the subject. Thus the fact of certain appearances in a dead body having been proved, the subsequent question whether such appearances indicate poison, is wholly out of the power of the best informed men to determine, unless they had made such subject a previous study. Again, the market value of an article at a given time, upon the allowance of damages on which a jury has to pass, is frequently a question, such as dealers in that article can alone decide. There it is a matter of necessity to call in the experienced or instructed opinion of such witnesses. No proof of the naked state of facts as to a ship after a storm could perhaps enable a landsman, however intelligent, to judge of those necessities which are so often to be inquired into in marine contracts. Thus also in an action for negligently steering a ship, as in *Mallot v. Neabit*, 1 Carr. & Payne, 76, mere proof of the naked facts could not enable a jury of landsmen to draw any inference; and experienced nautical men are called in to prove whether facts of that kind amount to unjustifiable negligence. Opinion is admitted when a jury is incompetent to infer without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained, or the likelihood of their occurring from the facts actually proved before them. Indeed it would be more logically accurate to say that mere opinion, even of men, professional or expert, is not admissible as such: but that facts having been proved, men skilled in such matters may be admitted to prove the existence of other more general facts or laws of nature, or the course of business, as the case may be, so as to enable the jury to form an inference for themselves. Thus the existence of certain appearances in the dead body having been proved, the chemist testifies that such appearances invariably or generally indicate the operation of some powerful chemical agent. His scientific opinion is in fact his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and which when proved afford them the means of drawing their own conclusions from the whole mass of testimony taken together.

The same reason of absolute necessity has compelled the admission of evidence of opinion in certain cases where the poverty of human language

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makes it absolutely impossible to separate in words the minute and transient facts observed by the witnesses from the inference as to some other fact, irresistibly connected with the former in his own mind. Testimony as to hand writing, I think, resolves itself into this, as no words can fully convey to others the minute particularities on which such judgment is founded. So too, in questions of identity as to men, to goods, horses, &c. though the facts on which such judgment is founded may be partially stated, still the judgment or opinion is admitted. In these cases the witness swears as to the present conviction of his own mind as to an actual fact, though deduced from circumstances which cannot be made palpable to others. It is often difficult to draw a line of distinction between testimony to simple facts, and the statement of such immediate and conclusive inferences as the witness forms in his mind.

Beyond this, when you let in the mere expression of opinion as to probabilities and contingencies, you have nothing to check the influence of partiality or prejudice, or other "worse motive, or to enable a [*676] court or jury to discriminate between ignorant or purchased opinion, and that which is fair and enlightened. The differing opinions of physicians, arists and other experts, at trial, is of constant observation ; yet there the known rules of art, laws of science, and the knowledge and observation of life, afford salutary checks against careless or partial testimony. To admit mere opinion of by-standers as to probabilities, is going much beyond the policy of our law, and losing sight of that distinction between admissibility and credibility which our jurisprudence has always maintained.

In the present case, it seems to me wholly inadmissible, that each witness should, as a matter of right, be allowed to give his opinion to the jury as to mere contingent probabilities. Whether a building was in the direction of the flames or exposed to their ravages, or appeared about to take fire, these and similar circumstances were present facts, and the legitimate subject of testimony. The rest is mere opinion. There might be particular knowledge and experience of *firemen or builders* ; there might be the expression of an opinion connected with the statement of facts upon which it was formed at the time ; and if particular evidence of that nature had been excluded, it might *perhaps* have formed good cause of exception upon its own special grounds and reasons. The inclination of my own mind is to extend the competence and admissibility of testimony as far as can be done consistently with the principles of our law, and I am therefore desirous to confine my own decision in the present case to the denial of the unqualified claim of right to present as testimony the mere opinion of any witness who was present, as to the probabilities of what might have occurred had such an event not been anticipated by the act of the city authority. As a general rule, I think that the doctrine maintained by Chief Justices Mansfield, Kenyon and Gibbs,

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and our own supreme court, 7 *Wendell*, 72, rejecting mere inferences of opinion drawn by witnesses from the facts proved by others, extends and applies likewise to the admissibility of mere naked opinion as to probable contingencies founded upon facts formerly seen by the witnesses themselves. [*677] “In the language of those decisions, “This is mere opinion, and not evidence.”

It has been suggested since the argument of this case, that it may be doubted whether the two questions which have been last considered are fairly before this court, or were so before the supreme court, upon proceedings brought up by *certiorari*. As, however, they have been fully argued before us without objection on either side, and as the conclusion to which I have come leaves the decision of the court below undisturbed, I have thought it right to state in full the reasons of these conclusions on which I must rest my decision of the present cause, in the absence of all argument or objection as to the extent of our appellate authority and that of the supreme court. If that doubt be well founded, which I have not yet examined, the result must be the same, and the judgment of the supreme court should be affirmed.

The CHANCELLOR generally expressed his concurrence in the views of Senator Verplanck.

Senator ROOT thought that the allowance of *interest* was improper.

On the question being put *Shall this judgment be reversed?* three members of the court voted in the *affirmative*, and nineteen in the *negative*. Whereupon the judgment of the supreme court was **AFFIRMED**.

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3. A plaintiff, on producing the written contract, may recover under a general *indebitatus assumpsit*, if the agreement has been fully performed by him, and there was nothing special in the contract in relation to the time or manner of payment; or the credit, if any has expired. So the plaintiff may recover on an *indebitatus assumpsit* for work done, though there was a special contract where the work was actually done, but not within the time or in the manner specified in the contract, if such work was done with the approbation of the defendant. *id*
4. Where, however, the plaintiff is allowed to sustain his action in the latter case on a *quantum meruit*, the inquiry is not what under other circumstances he would be en-

- titled to recover, but what he is entitled to in reference to the contract price, and the damages sustained by the defendant in consequence of the want of a strict performance on the part of the plaintiff. *id.*
5. Where a female is debanched in the house of a stranger, and he by writing under seal authorizes a party standing *in loco parentis* to sue in his name for the recovery of damages, and a suit is accordingly commenced and judgment recovered, after which the nominal plaintiff acknowledges of record satisfaction of judgment, an action may be maintained by the party thus authorized to sue, against the nominal plaintiff for the recovery of the amount of the judgment, and the suit may be brought in *assumpsit*, notwithstanding that the writing giving authority to sue is under seal. *Stanton v. Thomas,* 70
6. An action for money had and received, will not lie by a creditor against a third person, in whose hands funds have been deposited by a debtor, with directions to pay them over to the creditor in extinguishment of a debt, unless there be an agreement either express or to be implied from the circumstances of the case, by which the funds become the property of the creditor, so that the debtor loses all control over them, and is disabled from giving them another direction; or unless the money be deposited with the concurrence of the creditor, expressed previous to its receipt by the agent. *Seaman v. Whitney,* 260
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- It is no defence to an action of debt on a recognizance of bail, that the defendant is not liable to arrest on an execution on the judgment in the cause in which the bail was put in; the remedy of the bail is to surrender the principal, if the latter does not apply for and obtain an *exoneretur*, to be entered on the bail piece. *Stever v. Sornberger,* 275
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2. A factor *del credere* who has made advances upon goods consigned to him for sale, and which have been delivered to a third person to forward, has a *lien* upon the goods, and may maintain an action against the bailee for nondelivery. *id.*
3. Where the partner of a *bailee* refuses to deliver goods to the owner, saying that he does not feel authorized to deliver them up in the absence of his partner, the bailee in an action against him cannot object that the defendant did not exhibit the evidence of his *title*; if that was the true reason for the non-delivery, the partner should have said so, and if the refusal had been made in good faith, the defendant would have been protected. *id.*
4. A *bailee* acknowledging by receipt to hold the goods for a third person, is in itself a conversion, and after having done so, and the agent having placed his refusal upon the absence of his principal, the bailee cannot claim to hold on the ground of lien for storage and *charges* paid. *id.*
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2. It is not necessary to allege in the declaration, that the notes or bills issued by such association, were signed by the president or vice-president and cashier thereof; it is enough to allege in general terms, that the association *made* the contract, *id.*
3. Whether certificates of deposit made by these associations are *negotiable instruments*, enabling an *endorsee* to bring an action in his own name, *quere*. *id.*
4. So also *quere*, whether these associations have authority to make *post-notes*, or *any negotiable notes*, *save such as are issued under the sanction of the comptroller of the state.* *id.*

5. Where, by the act of incorporation of a banking company, the legislature reserve the power of *annually* appointing one of the directors of the institution, and an *information in the nature of a quo warranto* is filed against the company for a *misuser*, an appointment of a director by the governor and senate *subsequent* to the filing of the information is not a waiver of the forfeiture. The *legislature* alone can waive such forfeiture. *The People v. The Phenix Bank,* 431 *gencce* is not required; but some inquiry must be made. *id*
7. An alteration of a promissory note by the payee thereof, so as to make it purport to be payable at a particular place, vitiates it in the hands of an *endorsee*, so that he cannot recover upon it in action against the maker. *Nazro v. Fuller,* 374
8. If it be doubtful whether it be an alteration of the note or a mere memorandum by the payee indicating where the demand of payment should be made to charge him as *endorser*, the question, *it seems*, should be submitted to a jury. *id*
9. On a *guaranty* endorsed upon a note, whereby the *payment* and collection of the note is guaranteed to a third person or *bearer*, an action lies by any subsequent holder in his own name. *Ketchell v. Burns,* 56
- See CONSIDERATION, 1. USURY.*
- C
- CERTIORARI.**
- See HIGHWAYS, 5.*
- CITIES.**
- See CONSTITUTIONAL LAW.*
- CHAMPERTY AND MAINTENANCE.**
- See DEED, 1, 6,*
- CHANCERY.**
- Where a bill in chancery is dismissed for want of jurisdiction, an order prohibiting the complainant from again litigating the subject matter of the bill will not be made on the ground that it had been passed upon by the chancellor and decided against the complainant. *Smith v. Adams,* 585
- See LIMITATIONS (STATUTE OF.) TRUSTS.*
- COMMISSIONER OF DEEDS.**
- See CONSTITUTIONAL LAW.*
- COMMON SCHOOLS.**
1. A vote of a *school district meeting* postponing the collection of a tax for the re-
2. **BILLS OF EXCHANGE AND PROMISSORY NOTES.**
1. Where a bank discounts a note to extinguish a debt due to it from the holder or the proceeds are applied towards discharge of his liability, such acts are equivalent to paying value at the time, and constitute the bank, holders for valuable consideration. *Bank of Sandusky v. Scoville,* 115.
2. A certificate of a notary, that he sent notice of protest to an endorser, directed to a certain place, the *reputed place of residence* of such endorser, is sufficient presumptive evidence that such place is the *reputed place of residence* of the party. *Bell v. Lent,* 230
3. Whether his certificate that he had not been able to find the endorsers, after making diligent search and inquiry for them, is sufficient evidence of such inquiry, when the notice of protest is sent to a wrong place, *quere.* *id*
4. Where the holder of a note payable at six months, agreed at the time of the taking thereof, to surrender the note, provided the maker before its maturity gave him a *satisfactory acceptance* at six months, and such acceptance was tendered and refused to be received by the agent of the holder, and was thereupon destroyed by the acceptor, who had personally made the tender, it was held, that by such destruction the holder of the note became entitled to elect whether to sue upon the note, or upon the acceptance, and that an action upon the note brought previous to the expiration of the second period of six months was maintainable. *Gayle v. Suydam,* 271
5. Notice of protest sent per mail, directed to the *drawer* of a bill of exchange at the place where the bill on its face purports to have been made, is not sufficient to charge the drawer, where no inquiry is made as to the place of his residence. *Lowyrey v. Scott,* 358
6. Where, in such case, the bill at maturity is in the hands of an *endorsee*, great dil-

- pair of a school house until the repairs are finished is a valid vote, and authorizes the collection of the tax. *Folsom v. Streeter*, 266
2. A warrant for the collection of a tax voted at a school district meeting may be issued by a majority of the trustees, who are also competent to renew the warrant; it is not necessary all of them should concur. *id*
3. A warrant also may be renewed as often as the circumstances of the case require. *id*
4. Whether an apportionment of the tax may legally be made by two of the trustees in the absence of the third, *quere*; the act of two, however, in making the apportionment will be held valid, unless it affirmatively appear that the third was not notified and did not attend. *id*
5. A warrant for collection is valid in form, which directs the collection of the tax in case of non-payment by distress and sale of goods in the same manner as is directed in warrants issued by the boards of supervisors for the collection of taxes. *id*
6. A party assessed cannot object to the validity of a warrant under which his goods are sold, that after the delivery of it to the collector the sum assessed to him is reduced in amount by one of the trustees of the district. *id*

COMPOSITION DEED.

See Debtor and Creditor.

CONSIDERATION.

1. The transferring to another a bargain for the purchase of land is not a good consideration of a note for the payment of money, where there is no valid agreement on the part of the owner of the land to convey, and where the negotiation with him for the sale of the farm was made without any request from the maker of the note. *Ehle v. Judson*, 97
2. A mere moral or conscientious obligation, unconnected with a prior legal or equitable claim, is not a sufficient consideration to support a promise. *id*
3. Want of title in the vendor of personal property is no defence to an action brought for the recovery of the purchase money, where there has been no recovery by the owner against the purchaser. *Case v. Hall*, 102

4. If the vendor fraudulently represents himself to be the owner, when he knows to the contrary, such fact may be set up in bar of a recovery; or it seems an action on the case may be brought against the vendor. *id*
5. Where a party enters into an obligation under seal for the debt of another, it is not necessary to allege any consideration. *Bush v. Stevens*, 256
6. Where a party by a written instrument recited that he had taken a lease of a lot of ground in a certain street, and agreed on the opening of another street into the street in which the lot was situated, that he would pay his landlord \$100 as soon as such new street should be opened; and it was proved that such writing was executed contemporaneously with the lease recited in it, IT WAS HELD, that the execution of the lease was a sufficient consideration for the agreement, and that in an action on the agreement the landlord was entitled to recover. *Andrews v. Pontue*, 285
7. It seems also, that though the consideration had been past and executed, upon proof of the making of the lease, the jury would have been warranted to infer that it was executed at the request of the defendant; and that even the word agree might import evidence of a consideration sufficient to support the agreement. *id*.

See Frauds, (Statute of,) 1, 2, 3.

CONSTITUTIONAL LAW.

1. An act of the legislature imposing a tax upon a local district of the state, in reference to a public improvement, such as a canal, is valid and constitutional, notwithstanding that previous to the passage of such act, a number of individuals of such district had entered into a bond to the state, by which they bound themselves to pay the whole expense of the improvement. *Thomas v. Leland*, 65
2. The common council of a city, incorporated as such subsequent to 1st January, 1830, have no power under the general act to determine and limit the number of commissioners of deeds to be appointed in such city; the power is confined to the common councils of cities created previous to that date: and accordingly it was held that the appointment of a commissioner of deeds by the governor, with the advice of the senate, for a city incorporated since 1st January, 1830, was not a valid appointment. *The People v. Salisbury*, 409

CONTRACT.

1. Where a contract is made for work to be done at a stipulated price, and it is discovered before the work is commenced, that a *misrepresentation* has been made in respect to its value, the party engaging to do the work may repudiate the contract; if he does not do so, but goes on and performs it, he can demand no more than the contract price. *The Saratoga and S. Rail Road Co. v. Row,* 74

2. Where a party, in consideration of another having conveyed to him 14 city lots for *only \$21,000*, *covenanted* that he would by a certain day erect two brick houses of specified dimensions, on the property purchased, or, in default thereof, pay to the grantor *on demand*, after the specified day, the sum of \$4000: *it was held*, that the sum specified was not a *penalty*, that it should be deemed part of the contract price of the lots, and that on failure to erect the houses, the *covenantee* was entitled to recover the specified sum, and should not be limited merely to *damages* for the non-erection of the buildings. *Pearson v. Williams' administrators*, 244

See PLEAS AND PLEADINGS, 10.

CORPORATIONS.

1. An *action at law* lies against an *individual stockholder* of a corporation formed under the *act relative to incorporations for manufacturing purposes*, for debts owing by the company at the time of its dissolution; and he may be charged to the extent of his shares of stock. *Bank of Poughkeepsie v. Ibbotson*, 473

2. In such suit, it is not necessary to allege specially in the declaration the grounds relied on as evidence of dissolution; a general averment of dissolution is enough. *id*

3. A *joint action* against *all* the stockholders it seems cannot be maintained. *id*

COSTS.

1. A *re-taxation* of a bill of costs will be ordered when demanded by an attorney either of his own *client* or of the *opposite party*, even after a *discontinuance* of the suit and payment of the money, upon complaint of error in the taxation. *Stockholm v. Robbins*, 109

2. The same rule does not invariably prevail between *attorney* and *client*, as between *party* and *party*, in respect to the *amount* of costs to be recovered. *id*

3. An attorney, however, is not entitled to charge his *client* for swelling an original writ by *special counts* spread out in the writ when the common *money counts* would have sufficed. *id*

See EXECUTORS AND ADMINISTRATORS.

COUNTY OFFICERS.

1. A *county clerk* is not entitled to compensation for *continuing general indexes* of the names of grantors and grantees, mortgagees and mortgagees contained in the books of records in his office of deeds and mortgages. *The People, ex rel. Traver, v. The Supervisors of Dutchess*, 181

2. The authority of a *deputy clerk*, who discharges the duties of the office of county clerk in consequence of the *death* of his principal, ceases on the *appointment* by the governor of another person, to execute the duties of the office until the *vacancy* in the office of clerk be supplied by an election. *The People, ex rel. Smith v. Fisher*, 215.

3. Where a road was laid out through the lands of an inhabitant of a town, and the supervisors of the county made out a tax list and warrant so as to collect the sum allowed as *damages* to the owner, and to have the same paid over to him, and subsequently altered the warrant, directing the collector to pay over the amount allowed to the *supervisor* of the town instead of to the *commissioners of highways*, and the money was paid over to the *supervisor*; and at the next annual meeting of the supervisors they directed the supervisor to whom the money was paid to pay over a *portion* of it to the owner of the land, and the *residue* to the county treasurer to the credit of the town in which the money was collected, and instead of complying with such order, the supervisor paid over the whole sum to the owner of the land, *it was held*, that an *action* for money had and received did not lie against the supervisor, at the suit of the *supervisors of the county*. *Supervisors of Dutchess v. Sisson*, 387

COURT OF COMMON PLEAS.

- A court of common pleas in an *appeal case*, are bound to pronounce on all *questions of law* raised and passed upon in the court below. Where such court refused to hear and decide upon a question of the *sufficiency of an affidavit*, presented upon the application for an attachment in the court below, and such affidavit was in fact *insufficient*, the judgment of the common pleas was reversed. *Bennett v. Ingersoll*, 113

COURTS OF JUSTICES OF THE PEACE.

1. *It seems* a party may sue out an attachment from a justice's court, although his demand exceed the jurisdiction of the court, provided that the sum for which judgment be claimed is within its jurisdiction. *Bennett v. Ingersoll*, 113
2. On a defendant in a justice's court making affidavit that the justice before whom the proceedings are had is a material witness for him, and that the facts he relies upon cannot be shown by any other witness, the suit must be discontinued. The justice cannot refuse to enter judgment of discontinuance, on the ground that he knows nothing material between the parties, and has no recollection of the facts which the defendant affirms he expects to prove by him. *Hopkins v. Cabrey*, 264
3. An attachment issued under the non-imprisonment act is void, if it be made returnable more than four days after its date, although the proceeding be under § 34 of that act, allowing such process against a debtor about to remove his property from the county. *Webber v. Eysaman*, 485
4. A constable, however, executing an attachment returnable more than four days after its date, is protected, although he knew the facts limiting the return of the process to four days, provided that in other respects the process be good on its face. *id*

See DAMAGES, 1.

COVENANT.

See LANDLORD AND TENANT, 2. PARTNERSHIP, 1. PRINCIPAL AND SURETY, 1, 2, 3.

CRIMINAL LAW.

1. Where in an indictment for murder the crime is charged to have been committed with a premeditated design to effect the death of the person killed, the premeditated design or express malice must be proved, or the prisoner cannot be convicted, although the act be also charged to have been done with malice aforethought; the description of the character of the crime, viz. its perpetration with a premeditated design, cannot be rejected as surplusage. *The People v. White*, 520
2. Where a judge, in his charge on the trial of a criminal case, after alluding to the benefit of good character to the accused in a doubtful case, called the attention of the

jury to the absence of such proof in the case before them, *it was held* that he had erred, and a new trial was granted. *id*

D

DAMAGES.

1. In an action on an attachment bond where the party suing out the attachment had failed to recover, the plaintiff is entitled to recover, not only the costs of the defense in the suit before the justice, but also damages for the seizure and detention of the property. *Dunning v. Humphrey*, 31
2. A plea of non *damnificatus* as to part, and tender of a sum certain as to the residue in bar of the action, cannot be sustained. *id*
3. Where a party had an easement in the land of another, viz. the right to cut a ditch or water-course, *it was held* that the owner of the land had the right to erect fences across the water-course, and that if the other unnecessarily or wantonly removed them, he was liable in damages and that the owner, for such removal of the fences, was entitled to recover, though no actual damage was proved. Every unauthorized person upon the land of another is a trespass for which an action lies, though the damages be merely nominal. *Dixon v. Clow*. 188
4. Where a party contracts to load a ship to a given amount of tons, at a stipulated price per ton, and falls short in shipping the whole number of tons, the owner or master of the vessel is entitled to recover, in the nature of damages, freight for the deficiency; but where in such case goods are offered by a third person, to be shipped to an amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at the current prices, the owner or master of the vessel is bound to receive such goods, and place to the credit of the original charterer the net earnings of such substituted cargo, after making all reasonable deductions resulting from the circumstances of the case. *Heckscher v. McCrea*. 304
5. The rule of damages for the non-delivery of chattels sold is the market price on the day appointed for delivery less the contract price where the latter is not paid; it is of no consequence at what price the purchaser had agreed to sell to others. *Davis v. Shields*. 329
6. Where property tortiously taken by one person from the possession of another is

subsequently levied upon whilst in the hands of the tort-feazor by a *third person*, under a warrant of distress for rent due by the owner, such last taking may be shewn in *mitigation of damages*, in an action by the owner against the tort-feazor, if the latter took the property under an honest belief that he had title to it, and not for the purpose of subjecting it to the landlord's warrants. *Higgins v. Whitney*, 379

7. In an action of *trespass* by a father for assaulting and beating his son *per quod servitium amisit*, a jury, in assessing the damages, are not authorized to take into account the wounded feelings of the parents. *Cowden v. Wright*, 429

See Assumpsit, 4. *Contract*, 1.

DEBT.

See Contract. Sheriffs.

DEBTORS.

See Joint Debtors.

DEBTOR AND CREDITOR.

1. Where a *voluntary assignment* for the benefit of creditors was made by debtors, and the deed of assignment placed in the hand of the assignee who hesitated to accept for six hours, and then claimed the property, but before he concluded to accept, the property was levied upon by virtue of executions against the assignors, it was held, that the judgment creditors had obtained a *lien* upon the goods, and were entitled to have their debts satisfied in preference to the debts of the creditors provided for by the assignment. *Crosby v. Hillyer*, 280
2. A creditor who has signified his assent to a composition between his debtor and the creditors at large of such debtor, cannot subsequently withdraw his assent without the consent of the debtor; but if such consent be given, the debtor cannot afterwards set up the agreement for a composition, in bar of an action for the recovery of the original demands. *Fellows v. Stevens*, 294
3. Assent to a composition may be as well by surrendering debts and taking composition notes, as by signing and sealing a composition deed. *id*
4. A composition as to simple contracts, may be by *parol*, but whether to affect debts due by *speciality*, it should not be under seal, *quare*. *id*

5. As between a debtor and creditor, an *accord* to accept a less sum than the whole debt, is no bar, though satisfaction be tendered: but if the accord extend to all the creditors of the debtor, it is otherwise. *id*

DEED.

1. A *deed* obtained by the grantee of lands in the *actual possession* of another, held adversely to the title of the grantor, is void, although the title under which the party in possession holds is bad. *Thurman v. Cameron*, 87
 2. A *certificate* made by statute, evidence of certain facts, requires no proof of its genuineness, where on its face it appears to be regular. Thus the certificate of the acknowledgment of a deed is received without proof of the *official character* of the officer granting it, of his *signature*, or that it was granted *within the jurisdiction* where he is authorized to act. The evidence, is only *prima facie*, and may be rebutted. *id*
 3. It is not necessary that a certificate of acknowledgment should be *endorsed* on the deed; it is enough if it be on any part of it. *id*
 4. Nor is it necessary that the officer should certify that he knew the person making the acknowledgment to be the grantor described in the deed, if he state that he knew him to be the person who *executed* it. *id*
 5. Where premises adjoining a river above tide water, are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque filum usque*, unless the river be expressly excluded from the grant by the terms of the deed. *Luce v. Curley*, 451
 6. A license given by the owner of the bank of a river above tide water, to abut a dam built across such river to the bank owned by him, is a perfect answer to a claim of *adverse possession* set up by the party obtaining such license, or by a *purchaser* from him, although the purchase be made without notice of such claim. *id*
- See Evidence*, 3.
- DOWER.
1. Since the revision of the laws in 1830, where a husband dies, his widow is entitled to dower in the lands whereof he was

seized, notwithstanding that previous to 1830, for many years she lived in open adultery away from him, if a divorce was not obtained. Had the husband died previous to 1830, she would have been barred under the *act concerning dower*, passed in 1787, notwithstanding a divorce had not been obtained; but that act having been repealed the widow now by the *revised statutes* is not barred, unless the marriage contract has been dissolved by a *divorce*. *Reynolds v. Reynolds*, 193

2. Previous to the *death* of the husband, the wife had no *right, interest or estate* in the lands of her husband which could be *forfeited* by the *adultery*; and therefore, the *act of 1787* had no operation in barring her *dower*. *id*

E

EJECTMENT.

1. *Ejectment* cannot be brought by a *committee of the person and estate* of an individual in respect to whom a writ in the nature of a *writ de lunatico inquirendo* had been issued, and an *inquisition* found that he was incapable, &c. *Petrie v. Shoemaker*, 85
2. The effect of a *deed* of land executed by such individual alluded to. *id*
3. Where, on trial of an *ejectment* a verdict is entered for the plaintiff, with leave to the defendant to move to set it aside, on the motion for a new trial the defendant is not allowed to object that the plaintiff *failed to show title in himself*, if such objection was not raised at the trial. *Thurman v. Cameron*, 87
4. Where a testator gives a farm to his son in *fee*, *upon condition* among other things that his daughters shall have the use and occupation of a room in his dwelling house, and be provided with food, raiment and fuel as long as they remain unmarried, and there be a *breach of the condition*, an action of *ejectment* lies by the daughters for the recovery of the shares of the farm to which they would have been entitled as the children of their father. *Hogeboom v. Hall*, 146
5. Such condition is annexed to the estate, and binds the land, in whose hands soever it may be. *id*
6. To work a *forfeiture* of the estate in such case, there must be something more than a *mere denial of the right*; there must be some *act* done, as *shutting up the house*, &c. Great strictness is required.

ed where the *forfeiture* of an *estate* is sought. *id*

7. In a controversy in an action of *ejectment* between one claiming under a *prior possessor* and the other under a *subsequent possessor*, the obtaining of a deed by a predecessor of the latter from several of the heirs of the *prior possessor*, is an admission of title in their ancestor. *Northrop v. Wright*, 221
8. Such deed fastens upon the grantee and those claiming under him the character of a *tenant in common* with the grantee of the *other heirs* of the *prior possessor*, and the possession held under such deed is *not adverse* to the rights of the other grantee, unless the presumption arising from the acceptance of the deed be satisfactorily explained. *id*
9. Possession of twenty-seven years by one tenant in common, although during all that time the right of the co-tenant had not been recognized, *WAS HELD*, in this case, not to be sufficient to authorize a jury to presume an *ouster*, where before twenty-five years had elapsed, the co-tenant had made an actual entry upon the land, and was forcibly expelled. *id*
10. Since, as before, the *revised statutes*, a plaintiff in *ejectment* is entitled to recover *mesne profits* only for the period of six years; and now he is limited to that period, although the *statute of limitations* be not pleaded. *Jackson v. Wood*, 443
11. In ascertaining the *mesne profits* or the rents of premises situate in the city of New-York, interest may be computed upon rents from the expiration of the quarter-days, instead of the expiration of the year. *id*
12. A naked possession of land, unaccompanied by a claim of right, never constitutes a *bar*, but enures to the benefit of the true owner. *Humbert v. Trinity Church*, 587
13. So if a man have title as *tenant in common*, and be in possession, he is presumed to hold for himself and his co-tenants; but such presumption may be rebutted by proof of acts or declarations, indicating an intention to exclude his co-tenants, such as a *disavowal* of his holding as a *tenant in common*; and if he in fact keeps out his co-tenants, such acts and declarations constitute an *ouster*, and his possession from that time becomes *adverse* within the meaning of the statute. *id*
14. A possession to be *adverse*, must be inconsistent with the title of the claimant who

is out of possession ; it must be accompanied with a claim of title, exclusive of the rights of all others ; and must be definite, notorious, and continued for the period of 20 years. *id*

15. Where there is an actual occupation of premises, an oral claim is sufficient to sustain the defence of adverse possession ; it is only where a constructive adverse possession is relied upon, that the claim must be founded on color of title by deed or other documental semblance of right. *id*

ERROR.

1. The supreme court, on a writ of error removing a record from the common pleas, will not look into a special report made by referees to the common pleas containing only the evidence of the facts transpiring upon the hearing, and the decisions made in the admission and rejection of testimony, and upon questions of law arising in the course of the hearing. *McPherson v. Chendell,* 15

2. On the refusal of a court of common pleas to set aside a report of referees for alleged errors in the hearing of the cause, if the losing party desires to review in the supreme court the decision of the common pleas, he must procure a statement of facts, not the evidence of the facts, to be drawn up under the direction of the common pleas and placed upon the record in the form of a special report in the nature of a special verdict or bill of exceptions. *id*

3. Where a cause was tried in a justice's court, and the justice at the request of the jury, after they had retired to consider of their verdict, gave them, without the consent of the parties, his minutes of the trial, the common pleas on *certeiorari*, reversed the judgment rendered on the verdict of the jury, and this court, on *writ of error*, affirmed the judgment of the common pleas. *Neil v. Abel,* 185

4. How far the acts of judges *de facto* will be sustained, discussed by the CHANCELLOR, Mr Justice BRONSON, and Senators DIXON, FURMAN, Root and VERPLANCK ; and the right of a party affected to raise on writ of error an objection to the due organization of a court, discussed by the CHANCELLOR and Senator VERPLANCK. *The People v. White,* 520

5. The CHANCELLOR holds that the court for the correction of errors will listen to an objection appearing on the record, although not urged in the supreme court, if it be of such a character that had it been presented

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there, it could not have been obviated by the opposite party. *id*

See ASSUMPSIT, 1. COURT OF COMMON PLEAS, 1.

EVIDENCE.

1. A judge at the circuit may, upon his own motion, exclude evidence which he deems irrelevant ; he is not bound, although the opposite party does not object, to sit and hear testimony which can have no legal bearing upon the question to be tried. *Cooper v. Barber,* 105

2. A mortgagor of personal property is an incompetent witness for the mortgagee in a controversy between the latter and a purchaser under an execution issued subsequent to the execution of the mortgage, where such instrument is void for want of possession of the goods accompanying its delivery, and *actual possession* is not taken by the mortgagee until after the *levy* by virtue of an execution. *White v. Cole,* 116

3. Whether a certificate of the acknowledgment of a deed taken in 1784, not stating that the grantor was *known* to the officer, be sufficient to authorize the reception of the deed in evidence, *quere*. *Northrop v. Wright,* 221

4. Where a will produced on the trial of a cause was more than fifty years old, *it was held* that the legal presumption attached that the witnesses were dead, and that the party might resort to *secondary evidence* to prove the will ; and that its production with the probate attached was sufficient evidence to authorize its being read. *id*

5. Where a party on the trial of a cause avails himself of an *admission* of his adversary to sustain his action of defence, the opposite party is entitled to prove such other parts of the conversation had on his part as tend to explain, modify or even destroy the admission made by him ; but is not at liberty to call for such parts of the conversation had by him as relate to the assertions made operating in his favor upon the general merits of the case, but having no connection with the admission made. *Garey v. Nicholson,* 360

6. Evidence that the plaintiff, in an action of *slander*, aided in procuring an abortion, is inadmissible, unless the notice of justification shows that in so doing the statute was violated. *Bissell v. Cornell,* 354

7. After an equal number of witnesses have been sworn on each side in the impeaching

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- or supporting of the character of a party or witness, it is in the discretion of the presiding judge whether a greater or farther number of witnesses shall be examined. *id*
8. Where a bond and warrant of attorney were given for a sum certain, *payable on demand*, to secure the payment of certain specified notes, and a writing was entered into by the obligees of the bond stating the object of the transaction, and appropriating the proceeds of the judgment to be entered, *it was held*, that *parol* evidence was inadmissible to show an agreement entered into at the time of the execution of the papers enlarging the time of payment of the note. *The Farmers' & Manufacturers' Bank v. Whinfield*, 419
9. It was held, however, that it was competent in such case to show by *parol* evidence the nature of the transaction and the object and purpose of the parties; and also to show *fraud* on the part of the obligees by the *misreading* of the paper specifying the terms upon which the bond and warrant were executed. *id*
10. Such fraud, however; if found, would not vitiate the judgment; it would only affect the instrument misread, leaving the judgment to operate according to the real intentions of the parties. *id*
11. A court are not bound to receive irrelevant testimony from one party, because such testimony has been given by the other party without objection. *id*
12. Where irrelevant testimony is permitted to go to a jury, a new trial will be granted of course on a *bill of exceptions*, if the chances are equal that it may have had an injurious tendency on the minds of the jurors. On a *cause*, the court exercises its discretion, when it is plainly seen that no injury could possibly have resulted to the party objecting to the testimony. *id*
13. It seems, that in no case whatever is it proper to permit a jury to take with them when they retire to consider of their verdict, the documentary evidence submitted on the trial of a cause. *id*
14. A servant in charge of the property of his master, which has been injured or destroyed by the *negligence* of another, is a competent witness in an action *by the master* for the recovery of damages; but is not a competent witness in an action *against the master* for an injury to the property of another through his (the servant's) alleged *negligence*. *Dudley v. Bolles*, 465
15. Evidence of previous statements made by a witness in *confirmation* of his testimony is in general inadmissible. *id*
16. Whether a memorandum in *pencil*, purport-
- ing to be the examination of a witness taken on a coroner's inquisition, is admissible in evidence, *quere*. *The People v. White*, 520
- See ASSUMPSIT, 2, 3, 4. DEED, 2, 3, 4. INSURANCE, 3. PRINCIPAL AND SURETY, 2. NEW-YORK, (CITY OF,) 6.

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See CORPORATIONS, 2. JUDGMENTS. PARTNERSHIP.

EXECUTORS AND ADMINISTRATORS.

1. In an action against an *administrator*, the plaintiff cannot join a count on a promise by the *intestate* with counts on promises by the *administrator* for causes of action accruing since the death of the *intestate*; a promise by the *administrator* on an account stated of moneys due from the *intestate* in his life time may be joined with a count on a promise by the *intestate*, but not a promise by the *administrator* on an account stated of moneys due from himself. *Gillet v. Hutchinson's Administrators*, 184
2. A judgment for costs against plaintiffs suing as *executors*, rendered by the marine court of the city of New-York, will not be reversed simply on the ground of the award of costs; the court will intend that the costs were awarded on *special application*, unless the contrary appears. *Judah v. Stagg's Executors*, 238
3. Where a testator is indebted and dies within six years after the accruing of a cause of action against him, and within eighteen months after his death a suit be brought against his *executor*, who pleads the *statute of limitations*, the proper course for the plaintiff is, to reply that the cause of action did accrue within six years, and not to plead the facts specially that the cause of action accrued within six years before the death of the testator, and that the suit was commenced within eighteen months after that period. On such general replication, in the computation of time the eighteen months are excluded. *Howell v. Babcock's Executor*, 488
4. So in an action by an *executor* or *administrator*, where twelve months have elapsed since the death of the testator or *intestate*, and the *statute of limitations* is pleaded, it seems that it is not necessary for the plaintiff to reply specially the time allowed by law for the bringing of the suit, but may reply generally. *id*

See TRUSTS.

F

FORFEITURES.

See BANKS AND BANKING.

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FRAUDS.

See CONSIDERATION, 4. EVIDENCE, 9, 10.

FRAUDS, (STATUTE OF)

1. A covenant under seal, is not within the statute of frauds requiring an agreement to be in writing, expressing the consideration. *Douglas v. Howland,* 35 *id*
2. In a simple contract, the consideration must appear on the face of the writing, or in other words, be expressed by it; but it need not be in any particular form—it is enough, if from the instrument, by reasonable construction, the consideration can be collected. Collateral facts or surrounding circumstances to which the promise has reference, may be looked at to give effect to the contract. A consideration implied or inferred from the terms of the instrument, is as effectual as if expressly appearing on its face. *id*
3. A promise to answer for the debt, default or miscarriage of another, purporting to be made for value received, is a sufficient expression of the consideration, within the meaning of the statute; the particular consideration need not appear; it is enough that there be a consideration. *id*
4. A broker's memorandum is good, although no name be subscribed to it; the substitution of the word subscribed in the revised statutes for the word signed used in the old statute, does not change the law. It is enough that the names of the parties intended to be bound appear in the body of the memorandum. *Davis v. Shields,* 322
5. Where a sale is made through the intervention of a broker and in his memorandum terms of sale advantageous to the purchaser are omitted, it does not lie with the vendor to object to the memorandum in an action against him for the non-delivery of the property. *id*

G

GUARANTY.

See PRINCIPAL AND SURETY, 1 to 5. BILLS OF EXCHANGE, 9.

H

HIGHWAYS.

1. An order of commissioners of highways of a town in one of the counties of Long-Island, to close a road, on condition that proper swing gates were made and supported, made on a petition for the discontinuance of the road supported by the oaths of twelve freeholders, that the road had become useless and unnecessary, is a void order: the commissioners not being authorized to make the order upon such application. *The People v.* *Three of the Judges of Suffolk Co.* 249
2. So, an order of commissioners subsequently made, directing the gates and fence to be removed, and that the road should be of the width it had, previous to being enclosed, is equally void; the first order being a nullity, required no act on the part of the commissioners to vacate it. *id*
3. So, an order of three judges, to whom an appeal was made from the second order, reversing so much thereof as directed the road to be restored to its original width, instead of ordering it to be opened only three rods wide, (the original width being from seven to nine rods,) was also held to be void; the judges in such case having no jurisdiction. *id*
4. The remedy of the parties aggrieved under the second order of the commissioners was not by appeal to the judges, but by impeaching it collaterally, or by certiorari directed to the commissioners. *id*
5. The papers in this case were entitled *The Commissioners of Highways of the town of Southampton v. The Judges of Suffolk County*, it seems they should have been entitled *The People v. Three of the Judges of Suffolk County*. *id*
6. Where application is made to commissioners of highways for the laying out of a private road, it is their duty to summon the required number of freeholders to view the land, and not to delegate the authority to another. *The People, ex rel. Elliott, v. The Commissioners of Highways of Greenbush,* 367
7. Where, however, freeholders were summoned by a constable, in compliance with a precept issued by the commissioners, who when assembled were requested by the commissioners to act, and acted accordingly, the court refused to quash the proceedings it appearing that the party through whose land the road was laid was present and did not object to the proceeding. *id*
8. A traveller on horseback meeting another horseman or a vehicle on a public highway is not required to turn out in any particular direction to avoid collision; all that is required is prudent care under existing circumstances. *Dudley v. Bolles,* 465
9. The act relative to highways, authorizing commissioners to ascertain, describe and enter of record roads used as public highways for 20 years, confers no authority upon the commissioners to adjudge what was originally intended in relation to the width or location of the road, any further than such intention is manifested by actual user, and they cannot enlarge the width of the road or change its location. *The People, ex rel. The commissioners of Highways of Cortlandville, v. The Judges of Cortland County,* 491

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10. But where commissioners did, under the above authority enlarge a road by describing it as *three rods wide*, when in fact its width never exceeded *two rods*, and also *changed its location*, it was held that the party aggrieved had no remedy by *appeal* to the judges of the county in which the road is situated : *so held* by Judges BRONSON and COWEN ; the CHIEF JUSTICE dissenting, *id*
11. Whether the party aggrieved in such case has a remedy, and if so, what remedy, *quer.* *id*

I

IMPRISONMENT, (ACT TO ABOLISH.)

See BAIL.

INSOLVENTS.

1. In a plea of *an insolvent's discharge from imprisonment*, it is enough to give jurisdiction to the officer to allege the presenting of the *petition* and *schedule* required by the act ; it is not necessary to state all the facts giving jurisdiction. *Hayden v. Palmer*, 364
2. Nor is it necessary to aver that the *discharge* was exhibited to the sheriff when the insolvent is on the limits ; the provision of the act in this respect applies only where the insolvent is in *close custody*. *id*
3. A *discharge from imprisonment* is good, as well as where there are judgments against the insolvent in actions for *torts* as in actions on *contracts*. *id*
4. Giving preferences to creditors previous to an assignment under the act, may be urged in opposition to the granting of a discharge ; but it is no answer to a plea of discharge, although it appear on the face of the plea. It will not be regarded as fraudulent *per se* so as to avoid the discharge. *id*

INSURANCE.

1. A *policy of insurance* upon the body, tackle, &c. of a vessel, at and from New-Orleans, Campeachy and Havana, for the period of six calendar months from a certain day, is a *policy on time*, and does not limit the navigation of the vessel to voyages between the places specified in the policy ; provided the vessel take her departure from either of them, let her port of destination be where it may, she is under the protection of the policy for the whole period of the specified time. *Grouse v. The Sea Ins. Co*, 209
2. Where a ship is owned by two persons, in different proportions, and one of them agrees to procure her to be insured, and she is in fact insured, the policy expressing the insurance to be *on account of* —, and the vessel is lost, and the loss paid to the party who procured the insurance, an action for *money had and received lies against him*, at the suit, of the other party, to recover his *proportion* of the loss paid by the insurers. *Burrows v. Turner*, 276
3. A policy of insurance *on account of* — is equivalent to a policy for whom it may concern, and in such case proof *alunde* may be given to show the real parties in interest, although it be a *patent ambiguity*. *id*
4. Where a vessel insured for twelve calendar months, and if *at sea* at the expiration of the term, the risk to continue at the same rate of premium until her arrival at the port of destination, commenced (when 120 days of the policy were unexpired) a voyage ordinarily occupying 70 days, and in the course of her passages from place to place sprung a leak so that repairs became necessary, and whilst they were making the specified term expired, *it was held*, that the insurers were not liable for the loss of the vessel, which happened on her return passage to the port from which she departed when the voyage commenced, she not being *at sea* within the meaning of the policy at the expiration of the specified term. *The American Ins. Co. v. Hutton*, 330
5. Where a cargo of merchandise, which was insured, was seized and condemned by the French government under the *Berlin* and *Milan decrees*, and a compromise was subsequently made between the underwriters and the assured, by which the latter accepted from the former \$5000 in satisfaction of their claim against the underwriters, which was for \$15,000, and surrendered the policy, but did not assign or cede the right to claim indemnity from the French government, *it was held*, on the underwriters subsequently obtaining \$5000 under the convention between the American and French governments, providing indemnity for spoliation upon our commerce, that the *award* of the *commissioners* under the treaty, giving the money to the underwriters instead of the assured, was not *conclusive* as between the parties ; and that the money thus obtained was held *in trust* for the assured, and the underwriters were decreed to pay over the same. *The N. Y. Ins. Co. appellants, and Roulet and others, respondents*, 505
6. It was also held, that though an *action at law* might have been sustained for the recovery of the money, a *bill in equity* was proper ; the jurisdiction of the courts in a case like this being *concurrent*. *id*

J

JOINT DEBTORS.

1. In a joint action against the *maker* and *endorser* of a promissory note, which by the evidence of the *maker*, called as a *witness* for the *endorser*, is proved to be *usurious*, the plaintiff, although he cannot recover against both defendants, is entitled to a verdict against the *maker* whose evidence cannot

benefit himself. *Bloodgood v. Barnes*, 385

2. Nor can he recover against both defendants, or either of them, where the declaration contains only the *money counts*, upon a promissory note the consideration of the usurious note, where one of the defendants is maker and the other endorser of the former note, if a copy of such former note be not appended to the declaration. *id*

JUDGMENTS.

A fact found by a *special verdict* which would be a bar to a recovery or defeat a defense if properly pleaded but which was not pleaded will not be regarded by the court in rendering judgment; the court can look only at such facts as properly arise under the issues joined. *McCarty v. Hudson*, 291

See DEBTOR AND CREDITOR, 1. PARTNERSHIP, 2, 3, 4, 5. REPLEVIN, 1, 2.

JUSTICES' COURTS.

See COURTS OF JUSTICES OF THE PEACE.

L

LANDLORD AND TENANT.

1. Where a *lessor* puts an end to a *term* intermediate the days specified in the lease for the payment of rent, he is not entitled to claim an *apportionment of rent* and recover the portion accrued since the last rent-day, unless there be a provision in the lease allowing a demand *pro rata*. *Zule v. Zule*, 76
2. Where a lessor by deed demises a farm with the farming utensils and stock upon it for a specified term, reserving a right to sell the farm before the expiration of the term, and he exercises the right, it is questionable whether he can demand a return of the utensils and stock previous to the expiration of the term mentioned in the lease; but if he may demand such return, he cannot bring an action upon an *implied covenant* to do so, but must resort to the action of *trover* or *replevin*. *id*
3. A provision in a *lease* that the rent shall cease if the premises become untenanted by fire or other casualty, does not extend to the case of a building, in the city of New-York, becoming untenanted in consequence of the greater portion of it being taken down, to conform to an order of the corporation for the widening of the street on which it is situate. *Mills v. Baker's Executors*, 254
4. A *parol lease* for four years, though void in itself, may be shown in evidence to support a distress for rent where the tenant enters and occupies the demised premises. *Edwards v. Clemons*, 480

See REPLEVIN, 1, 2.

LEASE.

Where the owner of a mill, by a written contract without seal, stipulated to pay a millwright for repairing the mill a certain sum in advance and a certain other sum when the mill should be finished; and further agreed to secure the mill to the millwright until the profits, of the mill should be sufficient to discharge his claim; IT WAS HELD that the contract was not a lease, but an agreement for a lease; and it was further held, that if it could be considered a lease, it created an estate for life determinable when the claim of the millwright should be paid, and thus the estate being an *estate of freehold*, it could not be granted by writing without seal. *The People v. Gillis*, 201

LIBEL.

See SLANDER.

LIMITATIONS, (STATUTE OF.)

1. The *statute of limitations* may be interposed as a bar to relief in *equity* on a bill filed for the *settlement of boundaries* between adjoining tracts of land alleged to be confused, and praying a discovery, and also for an *account* as between *tenants in common*, the same as it may be insisted on at law in an action of *ejectment* or of *account*: on the principle that where the jurisdiction of the court is concurrent, time is as absolute a bar in one court as in the other. *Humbert and others appellants, and The Rector, &c. Trinity Church respondents*, 587
2. Where from the face of the bill, it appears that the *statute of limitations* has attached, and that the complainant has failed to bring himself within any of its exceptions, the defendant may *demur*, and is not bound to plead the statute. *id*
3. Even in cases of *exclusive equitable cognizance*, the *statute of limitations* is generally permitted to prevail in *equity* as well as at law, on the principle of analogy; but there are exceptions (besides those enumerated in the statute,) such as frauds, trusts, &c. in which the court exercises its discretion in permitting the defence. *id*
4. Neither *fraud* in obtaining or continuing the possession or *knowledge* on the part of the tenant, that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action within the prescribed period; nor will his *ignorance* of the injury, until the *statute*, has attached, excuse him, though such injury was *fraudulently concealed* by the contrivance of the wrongdoer. *id*

See EXECUTORS AND ADMINISTRATORS, 3, 4.

LIMITED PARTNERSHIPS.

See PARTNERSHIP, 7 to 11.

LUNATIC.

See EJECTMENT, 1.

M

MESNE PROFITS.

See EJECTMENT, 10, 11.

MORTGAGE (OF PERSONAL PROPERTY.)

1. Where a schooner was mortgaged for a *precedent debt* whilst out on a voyage from Oswego on Lake Ontario to Cleveland on Lake Erie, and delivery of the property was not made until after a levy of an execution against the mortgagor in favor of a third person, IT WAS HELD, that as against a purchaser under the execution, the mortgage was void within the meaning of the 5th § of the act relative to fraudulent conveyances; that although the absence of the vessel from port at the time of the execution of the mortgage was a sufficient excuse for not changing the possession, such excuse ceased when the vessel returned to port and possession was not forthwith taken by the mortgagee. *Sed vid. Smith & Hoe v. Acker*, 23 Wendell, 653. *White v. Cole* 116
2. The exceptions to § 5, specified in § 7 of the same act, to wit, contracts of *bottomry* or *respondentia*, and assignments or *hypothecations* of vessels or goods *at sea* or in *foreign ports*, refer to loans made or monies borrowed in reference to a particular voyage or voyages, are of a nautical character, and do not apply to mortgages of personal property in their ordinary sense. *id*
3. The general doctrine of this court in reference to personal mortgages vindicated. *id*
4. A purchaser at a sheriff's sale of personal property incumbered by a mortgage, will be deemed to purchase only the *equity of redemption*, where the mortgage is a *valid instrument* and the purchaser has notice of its existence; but not so where the mortgage is *fraudulent*, and the purchase is made *adverse* to the claim of the mortgagee. *id*
5. It seems, a mortgage of personal property is not a *pledge* within the meaning of the statute, (2 R. S. 290, § 20, 2d ed.) authorizing the sale of the interest of the *pledgor*. A pledge as applied to chattels is a *bailment*, that is, an actual delivery of the thing for the security of some engagement. After the title of the mortgagee has become absolute, the statute cannot divest it, and the property is not the subject of execution. *id*

N

NEW TRIALS.

1. On a motion for a new trial on a *case* made, the court will receive *documentary evidence*, which could not have been controverted had it been produced at the trial, to defeat the motion; but this rule does not apply where the motion for a new trial is founded on a *bill of exceptions*. *Hurl v. Coltrain*, 14
 2. Where on the trial of a cause certain facts are assumed to exist, without the proof of which the action could not have been maintained or defence sustained, the losing party on a motion for a *new trial* cannot insist upon the absence of such facts in a *case* made on which to move for a new trial. *Holbrook v. Wight*, 169
 3. A grantor's declarations after he has parted with his title are not admissible to affect his grantees; yet where such declarations have been received as evidence, a new trial will not on that ground be granted on a *case* made, where the court see that the result would be the same if the evidence was rejected—on a *bill of exceptions*, however, it would be of course in such case to grant a new trial. *Northrop v. Wright*, 221
 4. A new trial will not be granted, in an action for an escape, because the judge refused to permit a question to be put to a witness in this form: "By what means and in what manner did the prisoner break jail?" on account of the generality of the question. To entitle a party to such an inquiry, he should apprise the judge of his intention to show such a state of facts as would *excuse* the sheriff. *Fairchild v. Cuse*, 381
- See EJECTMENT, 2.*
- ### NEW-YORK, (CITY OF)
1. In an action by the Fire Department of the city of New-York, for the recovery of a *penalty* for keeping gun-powder beyond a certain quantity, within certain limits of the city, an *order* of the mayor and two aldermen directing the gun-powder to be *restored* to the owner, is not such an adjudication as may be given in evidence in bar of the suit; had an action been brought by the owner to try the question of *forfeiture of the powder*, and an adjudication made in his favor, it seems that such *adjudication* might be held as in the nature of an *estoppel* in the action for the pecuniary penalty. *Tulmage v. The Fire Department of the city of N. Y.* 235
 2. The CHANCELLOR and Senators DIXON, EDWARDS, FURMAN and VERPLANCK, hold that the *second associate judge* of the common pleas of New-York may preside in the court of oyer and terminer of that city and county, in the absence of a judge of the supreme court, a circuit judge or the first judge of the county, but cannot act *conjointly* with either of those officers. Senator WAGER is of opinion that he has no power under any

- circumstances to preside in that court. *The People v. White,* 520
3. So it was held by the CHANCELLOR, and *Senators Edwards, Furman, Root, Verplanck and Wagner*, that the *aldermen* of the city and county of New-York may preside in the court of oyer and terminer of that city and county: at all events, that their power to do so cannot be collaterally inquired into. *id.*
4. A party whose property in the city of N. York has been destroyed by an order of the city officers, to prevent the spreading of a conflagration, is entitled to an allowance as damages to the full value of the property destroyed, without any deduction of the amount insured. *The Mayor, &c. of New-York v. Penitz,* 668
5. So he is also entitled to interest on the value of the property from the time of its destruction. *id.*
6. The opinions of mere by-standers, that the buildings destroyed would have taken fire and been consumed, had they not been blown up by order of the city officers, are inadmissible in evidence; but whether the opinions of *firemen* and others having particular knowledge and experience in reference to fires, connected with statement of the facts upon which such opinions were formed at the time, would not be admissible, *quere.* *id.*
- ①
- OFFICERS.**
- See SHERIFFS, 6.*
- P
- PARENT AND CHILD.**
- See DAMAGES, 7.*
- PARTNERSHIP.**
1. One partner may maintain an action of covenant against his co-partner, whether the covenant be to pay a sum or do an act for the purpose of launching the partnership, or whether it be to perform any of the articles after the partnership has commenced. An action of covenant will lie although there may be accounts between the parties which require unravelling in equity. And where the partnership covenants have not been infringed for any length of time, the action of covenant is the proper remedy; a court of equity not interfering to restrain the breach of covenant, unless the bill pray and there are just grounds for a dissolution. *Glover v. Tuck.* 153
2. On an execution against one of two partners, the sheriff may seize the entire partnership effects, or so much thereof as may be necessary to satisfy the execution, and sell the interest of the partner against whom the execution is issued; and an action of trespass will not lie against the sheriff at the suit of the other partner or his assignees for delivering to the purchaser the property sold. *Philip v. Cook,* 389
3. The purchaser, in such case, becomes a tenant in common with the other partner, and if he purchase with notice that the goods are partnership effects, takes subject to an account between the partners, and to the equitable claims of the creditors of the firm in the name of the other partner. *id.*
4. It seems that the sheriff may, against the will of the other partner, deliver the property sold to the purchaser. *id.*
5. It seems the court of chancery is the appropriate forum to be resorted to by the solvent partner, or by the creditors of the firm against the purchaser for the enforcement of the lien, although courts of law in the exercise of their equitable powers, have sometimes interfered for the protection of the solvent partner or the creditors of the firm. The cases upon the subject adverted to, and commented upon, and the conclusion arrived at, that neither a court of equity or law have the power to stay an execution until an account be taken. *id.*
6. It seems the proceeds of the sale must be paid over to the execution creditor, and the recourse of the solvent partner or the creditors of the firm is against the property in the hands of the purchaser. *id.*
7. In the publication of the certificate of the terms of a limited partnership, it was held that a mistake in the publication of the names of the partners, as *Argale* for *Argall*, would not vitiate the publication. If there be doubt whether the mistake might not have tended to mislead, the question should be submitted to a jury. *Bowen v. Argall,* 496
8. A publication of the terms of partnership within three days after the registry thereof, was held a compliance with the requirement of the statute, that the same be published immediately, &c. provided that the publication be within the first seven days after the registry. *id.*
9. So the statute is complied with, if the terms of partnership be published in a daily paper once in each week for six successive weeks: each publication being deemed to represent seven days. *id.*
10. Whether placing the general partner upon a footing with other creditors in an assignment made by an insolvent firm, will be deemed contrary to the statute, *quere:* be that however as it may, such a provision will not convert a special partner into a general partner, and render him liable accordingly. *id.*

INDEX.

11. An error in the publication as to the amount of the sum advanced by the *special partner*, is unavailable on a writ of error, if no objection to the publication was taken on the trial of the cause. *id*

See PLEAS AND PLEADINGS, 7, 8, 9. PRINCIPAL AND AGENT, 4.

PAUPERS.

1. An action will not lie by the *superintendents of the poor* of one county against the superintendents of another county for the maintenance of a pauper removed from the county of the latter *without legal authority*, into the county of the former, where the removal is made at the *request of the pauper*, so that he may be under the care of his family and friends, and *without any intent on the part of the person removing him to make the county into which he is removed chargeable with his support*. *Cue and others, superintendents of the poor of Genesee, v. Smith and others, superintendents of the poor of Allegany,* 341

2. It seems, that the bringing of a pauper into this state, will not subject the person bringing him to the penalties of the act on this subject, unless it be done with the intent of subjecting some particular town or county to the charge of supporting such pauper. *id*

PHYSICIANS AND SURGEONS.

1. A physician may maintain an action for services rendered by him in his profession. *McPherson v. Cheadell,* 15
2. Whether he can maintain such action without producing a *diploma*, or a *license* granted by a medical society, after a compliance with the first act of the legislature upon the subject, *quere.* *id*
3. The effect of the several acts of the legislature regulating the practice of *physic and surgery* upon the rights of physicians, considered and commented upon. *id*

PLEAS AND PLEADINGS.

1. Where in covenant a specific act or any number of acts is to be done by the plaintiff, by way of *condition precedent*, he must shew in pleading precisely what he has done by way of performing them, with *such circumstances* as are material in point of law to raise the corresponding obligation. *Gloster v. Tuck.* 153
2. Where there are *several breaches* assigned in one count, some *good* and some *bad*, and there is a demurral to the whole count, the plaintiff will have judgment. The proper course for the defendant in such case is to demur to the defective portions of the count. *id*
3. Where a party covenants to pay *on request*, a *special request* sum must be alleged in the declaration; the general allegation of *sorpe requisitus* is not enough. *Bush v. Stevens,* 256
4. Where a party is bound to give *oyer* of a deed, he must furnish not only a true copy of the instrument itself, but of all endorsements and memoranda upon it, and of all papers attached to it, so that his adversary may have the same view of the matter as if the deed had been brought into court. *Van Rensselaer v. Poucher,* 316
5. A stranger to a deed is not bound to give *oyer*; the rule applies only to *parties or privies*, and even privies in estate cannot be required to give *oyer* unless they come in *conventionally*. If they become privies by the acts of others, or mere *operation of law*, they are not bound to give *oyer*. *id*
6. A notice of *justification* must in substance be as definite as a plea, but need not partake of its form or technicality. *Bissell v. Cornell,* 354
7. A *plea in abatement* for the non-rejoinder of parties admits the plaintiff's claim, but not the amount; the defendant failing to establish his plea, may contest the whole or any part of the plaintiff's claim, the same as on a plea of the general issue. He, however, must submit to a verdict against him for *nominal damages*. *M. & F. Bank v. Dakin,*
8. Where a defendant pleads the non-joinder of *one* as a co-defendant, and on the proof it turns out that there are *three* persons who should have been joined, the plaintiff is entitled to a verdict notwithstanding that the plea is verified. The defendant should have named *all* the joint contractors not on the record. *id*
9. So where four persons were sued as joint contractors, and were described as copartners carrying on business under a particular name, and one of them put in a plea in abatement alleging the non-joinder of three other persons; to which the plaintiff replied that the defendants were members of an association called *The New-York and Geneva Line*, formed for the transportation of passengers, and had omitted to file a statement of the names of the persons composing the association; and the defendant rejoined that he was not a member of an association transacting business under such name; it was held, that the plaintiff was entitled to a verdict, notwithstanding that it was proved that the defendant was not a member of the association *named*, but of another association: on the ground that the substance of the issue only is required to be proved, and that the name of the association specified in the pleadings may be regarded as *surplusage*. *id*
10. Where one party enters into a contract for the doing of work, and binds himself that the whole shall be done and completed to the

entire satisfaction of the other partner and of third persons, in an action to recover the price stipulated to be paid for the work it is necessary to aver in pleading that the work was done to the satisfaction of the arbitrators designated in the contract; though it seems that the plaintiff need not aver that the work was done to the satisfaction of the other party, and that in respect to that stipulation it would be enough to aver that the work was done pursuant to the contract. *Butler v. Tucker*, 447

11. A notice of special matter accompanying a plea, intended to be insisted on at the trial, is good if it fairly apprise the plaintiff of the material facts upon which the defendant means to insist. *Edwards v. Clemons*, 480
12. Where a defendant in replevin avows the taking under a demise at an annual rent payable quarterly, and the proof is that the rent is payable annually, (saying nothing as to quarterly payments,) there is a variance; but as it does not operate prejudicially to the opposite party, it may be disregarded at the circuit and the party be permitted to apply to amend his pleadings. *id*

See BANKS AND BANKING. DAMAGES, 2. EXECUTORS AND ADMINISTRATORS 3, 4. JOINT DEBTORS. SLANDER, 1.

PRINCIPLE AND AGENT.

1. An action will not lie against a factor or agent to whom goods are sent to be sold at auction, without a demand of the proceeds or instructions to remit, before suit brought. *Cooley & Bangs v. Eells*, 203.
2. It seems that there is a distinction between an action for not accounting and an action for not paying over the proceeds of goods sold, and that in the former case it is enough to show a neglect to account within a reasonable time, to maintain the action. *id*
3. Where an agent was directed by his principal to obtain securities for the payment of protested notes, and to hand them over when obtained to certain creditors of the principal, and the agent not having obtained new securities handed over the notes to the creditors, it was held that their title to the notes was good, and that an action of trover would not lie against them at the suit of the administrator of the principal, notwithstanding that the notes were delivered over after the death of the principal; the death of the principal under the circumstances of the case being deemed not a revocation of the power of the agent. *Nicolet's administrators v. Pillot & Le Barbier*, 240
5. Where there are two establishments in the same place for the carrying on the business of transportation of goods, both conducted by the same individual, in one of which he is a partner, and in the other sole proprietor, and he obtains moneys from a bank on

checks drawn by him signed in his own name generally as *agent*: in an action by the bank against the firm, for the recovery of a balance due upon such checks, the firm have the right to show that they are not indebted to the bank, and that the indebtedness, if any, is by the individual *solely* who drew the checks, where there is no proof that the other members of the firm knew the mode in which the checks were drawn. *The Mechanics & Farmer's Bank v. Dakin and others*, 411

See BAILMENT. SALE OF CHATTELS.

PRINCIPAL AND SURETY.

1. Where one party agrees to account and pay over such sum as shall be found to be owing by him, and a third person covenants that the party thus agreeing shall perform the agreement, an action lies against the covenantor or guarantor without notice from the covenantee of the non-performance of the principal. *Douglass v. Howland*, 35
2. A decree in chancery against the principal in a cause on a bill filed to compel an account, is not evidence against the guarantor, unless he had notice of the suit, and an opportunity given to defend in the name of his principal.
3. It seems that the doctrine of notice of non-performance applicable to negotiable paper, does not govern in the case of guarantees, where the guarantor undertakes absolutely that his principal shall perform. If it be intended that notice shall be given, it must be provided for in the contract; otherwise, the guarantor must inquire of his principal. So also, it seems, that the same rule prevails in regard to notice of acceptance of a guarantee. *id*
4. A guaranty addressed to a mercantile firm in these words: "We consider Mr. J. V. E. good for all he may want of you, and we will indemnify the same," is a valid instrument binding upon the guarantors, who are not entitled to notice of the acceptance of the guaranty or of the sale and delivery of goods under it to the principal. *Whitney v. Groot*, 83
5. Such a guaranty, however, is not a continuing guaranty; the party making it is liable for the amount only of such goods as were obtained on its first presentation, and not for those subsequently obtained, and the first payments made by the principal must be applied towards satisfaction of the charge for which the surety is responsible. *id*

R

REFERENCE.

1. Where referees are appointed to hear a cause, and the trial actually requires the examination of a long account, they have power to allow damages for the non performance,

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of a special contract, the same as if the cause had been tried by a jury. *Lee v. Tillotson*, 337

to pay cash, might have disaffirmed the contract and brought trover for the goods, *quere id*

2. The provision in the constitution of the U. S. securing a trial by a jury, relates only to trials in courts organized under the constitution and laws of the U. S., and is no objection to a cause being heard by *referees* in the courts of this state; nor is the similar provision in the constitution of this state an objection. Previous to the adoption of the state constitution, references were well known and sanctioned by statute. *id*
3. At all events, a party having *waived* a constitutional provision cannot subsequently ask for its protection. *id*

See ERROR, 1, 2.

REPLEVIN.

1. Where a plaintiff in *replevin*, to an *atowry for rent*, pleads a *tortious eviction* by the landlord, such plea is not sustained by proof that the landlord entered by virtue of *summary proceedings* under the landlord and tenant act for the non-payment of the rent. *McCarty v. Hudsons*, 291
2. Although such *entry* be found by a *special verdict*, the tenant is not entitled to judgment in an action of replevin brought for goods subsequently taken as a distress for rent, where he pleads a *tortious eviction*; to enable him to avail himself of such entry in bar of a distress for rent, he should *specially plead* the resort of the landlord to the other remedy. On the contrary, the landlord under such verdict is entitled to judgment *non obstante veredicto*. *id*

See BAILMENT. LANDLORD AND TENANT.

S

SALE OF CHATTELS.

1. Where goods belonging to his *principal*, were sold by a *factor* without knowledge of the ownership on the part of the purchaser, the latter, in an action on the contract by the principal, for the price of the goods, was held entitled to *set off* a demand against the factor, although the sale was a *cash sale*, and the purchaser, when he obtained the goods, did not intend to abide by his contract, but purposed to set off his demand against the factor. *Hogan v. Shorl*, 458
2. It was further held, that the purchaser in this case was entitled to his set-off, although it consisted of a note of the factor not due until forty-five days after the sale, the principal not having commenced his suit until *after* the maturity of the note. *id*
3. Whether if the factor or the principal, on discovering that the purchaser did not intend

1. A sheriff may be lawfully resisted in carrying away property from a house, the outer door of which being shut, he *opened* for the purpose of entering to make a levy by virtue of an execution against the property of the tenant. The distinction in the books that the sheriff in such case is protected as to the *levy*, but liable as a trespasser for the *entry*, denied. *The People v. Hubbard*, 369

2. In an action against a sheriff for the *escape* of a prisoner, he cannot object as a bar to the recovery, that the plaintiffs in the original action declared against the defendant *generally* as in custody, instead of declaring *specifically* that he was in *close custody*. *Fairchild v. Case*, 381
3. The act for *more easy pleading in certain suits*, does not extend to cases of *non-searcance* by public officers; a sheriff sued for a *negligent escape* cannot therefore avail himself of the *statute of limitations* without pleading it. Even when sued for a *voluntary escape*, whether the sheriff can avail himself of the *statute of limitations* without pleading it, *quere id*
4. Nothing but the act of God, or of the enemies of the country, will excuse the sheriff. *id*
5. *General reputation of the insolvency of the prisoner*, is inadmissible in an action against the sheriff for an escape. *id*
6. A special deputy is bound to show his warrant if requested to do so, and if he omit, the party against whom the warrant issued may resist an arrest, and the warrant under such circumstances is no protection against an action for an assault, battery and false imprisonment. *Frost v. Thomas*, 418

SHIPS AND SEAMEN.

See DAMAGES, 4.

SLANDER.

1. In a declaration in *slander* charging the defendant with having adopted certain *slandorous words* used by another, the *words spoken in the first instance must be set forth*; it is not enough to say that the speaker did charge and impute to the plaintiff the *crime of perjury*. *Blessing v. Davis*, 100
2. Where a party is sued for republishing a *libelous article* in a newspaper, and the republication is accompanied by remarks *tending to a justification* but not amounting to it, the defendant is not permitted to prove the truth of the remarks in *mitigation of damages* because the evidence would tend to prove

the charge well-founded. Evidence in mitigation must be such as admits the charge to be false. *Cooper v. Barber*, 105

3. Words charging a party with aiding in procuring an *abortion* (a crime created by statute) when speaking of him as having had illicit intercourse with a woman, are actionable *per se*; if the words were spoken in a sense other than that of imputing the crime, it is incumbent upon the defendant to show that they were spoken. *Bissell v. Cornell*, 354

4. A publication commenting upon a printed work is *libellous* which imputes to the author a disregard of justice and propriety as a man represents him as infatuated with vanity, mad with passion, and the apologist from force of sympathy of another stigmatised with ingratitude and perfidy; and which also charges him with publishing as true, statements and evidence falsified, and encomiums retracted: So HELD on *demurrer* to a declaration, the court ruling that the defendant could not on demurrer claim his communication to be *privileged* as a legitimate criticism; the question of privilege solely appertaining to a jury. *Cooper v. Stone*, 434

STREETS.

See LANDLORD AND TENANT, 3.

SURROGATE'S COURT.

1. An *administrator's deed*, under an *order of sale* made by a surrogate previous to the passage of the act of 1819 requiring a *confirmation* of the sale by the surrogate, is a good and valid deed, although executed subsequent to the passage of the act, and without the sale having been confirmed by the surrogate: the act applies only to *future cases*. *Fox v. Lipe*, 164
2. Whether an administrator authorized by a surrogate to mortgage lands of the intestate, can legally include a power of sale in such mortgage, and whether a foreclosure under such power is valid so as to bar a redemption of the premises, *quere*; but at all events, where the mortgage has been foreclosed under such power and the *mortgagee* has entered into possession, an action of ejectment will not lie against him by the heirs of the intestate. *id*
3. The *filing* of a bond by the administrator, faithfully to apply the moneys to be raised by the mortgage *seven days* after the execution of the mortgage, is a sufficient compliance with the act requiring such bond to be filed. *id*

T

TAXES.

See CONSTITUTIONAL LAW, 1.

TENANTS IN COMMON.

See EJECTMENT, 8, 9, 13.

TRESPASS.

See COURTS OF JUSTICES OF THE PEACE.
DAMAGES.
SHERIFFS.

TROVER.

See LANDLORD AND TENANT.

TRUSTS.

1. An action *at law* will not lie by a *cestui que trust*, against the executor of a *trustee*, created by an assignment for the benefit of creditors, upon an *implied promise* arising from the acceptance of the trust, and the conversion of the fund into money; the party must resort to equity. *Dias v. Brunell's Executor*, 9
5. *It seems*, had there been an *express promise* by the testator, and there had been *assets*, that an action would have lain against the executor. *id*
3. Property held in *trust*, on the death of the trustee, at common law passed to his executor; but not as *assets*. He took not as *executor* but as a *trustee*, subject to the same stipulations and conditions under which it was held by the testator. Now, by the revised statutes, *it seems* the trust vests in the court of chancery with all the powers and duties of the original trustee, and must be executed by some persons appointed for that purpose under the direction of the court. *R. S. 2d ed. p. 724, § 68.* *id*
4. *Real estate* directed by will to be sold, and the avails to be applied to the uses created by it, is in *equity* regarded as *personal property*; and the doctrine of *uses* and *trusts* and *limitations* of *real estate* has no application in such cases farther than is *expressly declared* by statute. *Kane v. Gott*, 641
5. The statute in regard to *estates in personal property* treats *only* of *accumulations* of interest or income, and of *expectant estates*. The mode of directing *accumulations*, so as to be valid, the statute specially points out. The suspension of absolute ownership is limited to two lives; and in all other respects, *limitations* of *future* or *contingent estates* are the same as if the subject were *real estate*. *id*

U

USURY.

1. Where an *acceptance* is given in consider-

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- ation of a promise that the party obtaining the acceptance, will at a specified period deliver to the acceptor a quantity of country produce, the acceptor cannot avail himself of the defence of usury, if the acceptance be subsequently, and before maturity, negotiated by the holder at a usurious rate of interest. *Cameron v. Chapell,* 94
2. A mortgage taken on the loan of \$700, to be paid in ten years with interest (the interest not to be paid until the expiration of the ten years,) is not usurious, though the loan be made upon an agreement that the mortgagor, in addition to the interest reserved, shall have, free of rent, the use and occupation of an acre of the mortgaged premises, worth eight dollars per year: the whole compensation for the loan not being equal to a reservation of compound interest. *Fox v. Lipe,* 164
3. Where a usurious loan is made and promissory notes are pledged as security for the re-payment of the money, an action upon the notes cannot be maintained by the lender against the borrower. *Bell v. Lent,* 230
4. Nor can an action be maintained by a third person who has received the notes from the lender under an agreement to collect them and apply the proceeds towards payment of a debt due to him from the lender. *id*
5. Where a note had been transferred by the payee, and an action was brought upon it by the holder against the maker, the payee, called as a witness by the maker, was held to be privileged from answering questions put to him for the purpose of showing any agreement respecting the note or the consideration thereof, or any payment thereupon to him, the defendant having avowed that his defence was usury, and that usurious interest had been received by the payee, as the tendency of the answers might be to subject himself either to a penalty or to an indictment for a misdemeanor. *Burns v. Kemsall,* 380

V
VARIANCE.

See PLEAS AND PLEADINGS, 11, 12.

VENDOR AND VENDEE.

As between a vendor and vender of land upon which there was a dwelling house without a fire-place, and without a chimney except from the chamber floor, IT WAS HELD, that a stove from which went a pipe into the lower end of the chimney was not a fixture, and did not pass with the land to the purchaser. *Freeland v. Southworth,* 191

See CONSIDERATION, 3.

W

WILLS.

1. Where a will was made directing real estate to be sold, the proceeds to be invested, and the income to be applied to the support of two nieces until they arrived at the age of twenty or married, and then the income to be paid to them in equal proportions during their respective lives; on the death of one without issue, the whole income to be paid to the survivor; on the death of both leaving issue, the whole trust fund to go to such issue; one moiety to the children of each; and on the death of the nieces without issue, the property to go to the mother of the testator: IT WAS HELD, that the nieces took immediate vested interests in their respective moieties of the income of the estate during their lives, with a remainder to the survivor for life in the moiety of the other dying without issue; and that on the death of both leaving issue, the fund went to their children. *Kane and wife, appellants, and Gott and others, respondents,* 641
2. Whether the income in the hands of the nieces is inalienable, and what is the effect of a decree declaring it so, *quere.* *id*
3. A will may be void in part, and yet good for the residue, and such portions of it as are not contrary to law will be saved, although it seems this conservative rule in the construction of wills has not always been observed. *id*

See EJECTMENT, 4, 5, 6.

END OF VOLUME TWENTY-FOUR.

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HARVARD L

